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Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

Josh A. Allen,

Petitioner,

v.

State of Montana,

Respondent.

On Petition For Writ of Certiorari
To The Montana State Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a Citizen have a duty to identify himself to a policeman when he knows or has reason to believe that by identifying himself he will be revealing information that will be used against him in a second unrelated prosecution?

2. Can the State of Montana ignore established federal case law by not allowing a Citizen to testify in his own defense due to his religious beliefs?

3. Is M.C.A. 45-7-302: Obstructing a peace officer or other public servant vague and ambiguous under the 14th amendment? Is it written so broadly that a Citizen can be charged with a crime for exercising his Constitutional rights?

PARTIES TO THE PROCEEDING

The Petitioner here is Josh Allen, pro se.

The Respondent here is Mike Mattioli Montana State Assistant Attorney General.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Josh Allen respectfully requests that a writ of certiorari issue to review the opinion of the Montana State Supreme Court in this case and that the opinion of the Montana State Supreme Court be reversed.

OPINION BELOW

The opinion of The Montana State Supreme Court, and that of the District Court, is available in the Appendix.

STATEMENT OF JUSRISDICTION

The Montana State Supreme Court entered it's Appellate decision on March 24th ,2009. The Montana State Supreme Court denied Petitioner's motion for rehearing on May12th, 2009. Petitioner filed for an extension to file a writ of certiorari, (ref. doc.# 09a84) granted by Justice Kennedy on July 27th 2009, giving petitioner until August 25th 2009 to file the writ. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

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CONSTITUTIONAL PROVISIONS

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STATEMENT OF THE CASE

Petitioner, a resident of Montana, has had prior to this case, numerous late-night run-ins with law enforcement. Most of these occurred while jogging. These situations involved an officer(s) stopping and interrogated petitioner, always demanding identification. This led petitioner on a study of case law involving identification, including Terry v. Ohio, Miranda v. Arizona, Brown v. Texas etc.

The following is a statement of facts from the petitioner's point of view, as petitioner wasn't allowed to testify in District court and create any contested issues of fact.

On March 22, 2007, Petitioner was walking and jogging home from a Bar at about 2:00 a.m. Petitioner was walking from out behind a building when he saw a police car about one block away. The cars turn signal was activated at the last second, and the police car began to head toward petitioner. Petitioner, wanting to avoid a late night confrontation turned and walked back behind the building he had just walked out from. Petitioner went completely around the back of the building, and proceeded to jog down an open alley (not lined with buildings on both sides) in the same direction that he had been walking before he saw the police car. After about a half block of jogging, petitioner heard a siren and car behind him. Petitioner stopped as the car stopped and sheriff deputy Cory Matkin got out of the car. The deputy ordered petitioner face down to the ground, and immediately placed petitioner in handcuffs. He then asked petitioner why he was running. Petitioner replied he was jogging. The

deputy then asked petitioner his name. Petitioner responded by asking if this was an arrest. The deputy responded that it was a detention. Petitioner, concerned that he had a warrant out for his arrest for a speeding ticket, and believing this was an arrest, chose to exercise his right to remain silent and did not give the deputy his name, saying he would exercise his right to silence. Petitioner was frisked, and taken to the local jail. There, petitioner was identified by his driver's license. Petitioner was charged with Obstructing a Peace Officer, for refusing to identify himself, under Montana Code Annotated (M.C.A.) 45-7-302,[1] a misdemeanor, for which he served four and one half days in jail. Petitioner refused to enter a plea before the Justice of the Peace, instead entering an answer to the complaint (doc.# 14), citing several similar U.S. Supreme Court cases, and the fact that there was no law in Montana requiring one to identify oneself to a peace officer. During this trial, petitioner was allowed to take the stand and testify in his own defense without taking

[1] (1)The relevant section states that a person commits the offense of obstructing a peace officer or other public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant, including a person serving process, shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

the oath or an affirmation, even though petitioner did not give notice ahead of time, instead citing his religious beliefs and relevant case law in favor of them on the court room floor. The petitioner was found guilty of obstruction, and given time served and an $85.00 fine to cover court costs.

Petitioner filed a motion for trial de novo in District Court. Petitioner then filed an answer to the complaint and request for dismissal (docket# 36), on 1/07/2008. In this document (page 4) petitioner raises the first federal question, stated exactly as it is stated in this petition. The district court responds by declaring that disclosure of a Defendant's name is not testimonial and therefore not in violation of *Miranda*. See Appendix (App.) 6 para. 11. The Montana State Supreme Court responds to the same question (app. 5 Para. 11) by citing *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humbolt Co.*, 542 U.S. (2004). [2] "*A disclosure of a suspect's name will not implicate the self incrimination clause if it presents no reasonable danger of incrimination.*" The court's faulty logic in answering this question will be exposed below in the **reasons for granting the petition.** The second federal question is: can the

[2] Nev. Rev. Stat. (NRS) §171.123(3) provides that:

"The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." (continued on following page) [2]It was determined that by refusing to identify himself, Hiibel violated NRS §199.280, which states:

"A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished ..."

State of Montana ignore established federal case law, and the first, fifth, sixth and fourteenth U.S. Constitutional amendments by not allowing a Citizen to testify in his own defense due to his religious beliefs? This issue was first raised when the District court was notified of Petitioner's stance on the oath issue by way of His "notice of refusal to swear or affirm to take an oath" (doc. #52) (app. 24-25) filed almost one month ahead of trial. During the trial, the Judge admits he didn't even bother to read the notice (trial transcripts page 38-39), which was well grounded in Federal case law at *Gordon v. Idaho, 778 F2d 1397 9th* (1985).

The district court decided this question at trial by way of not allowing petitioner to testify (trial transcripts page 38-41), Making the Montana rules of evidence superior to the 9th circuit's decision and U.S. Supreme Court Decisions. The Montana State Supreme Court answered the issue (App.7 para. 14) exactly opposite to the intent of *Gordon v. Idaho*. 9th fed.

The third federal question raised by petitioner is whether M.C.A. 45-7-302, is unconstitutionally vague and ambiguous in the same vein as California's Stop and identify statute which was ruled unconstitutional in *Kolender v. Lawson, 461 U.S. 352 (1983).* This was raised by petitioner in his answer to the complaint page (doc.# page 5) and refined in his appeal brief(s). The district court answers (app.14 para.8). The Montana State Supreme Court agreed with the District Court (app.6 para.12).

Petitioner timely filed a motion for rehearing, which was denied on May 12, 2009. This timely petition then followed.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court inconclusively answers a question of national importance; which if answered, would help the general public better understand what their Miranda rights are. The Montana Supreme Court also decided important legal questions pertaining to equal protection and due process contrary to the 9th federal circuit.

1. The Montana State Supreme Court answers the first federal question in an illogical manner, inconsistent with U.S. Supreme Court case law, and contrary to the intent of Montana law.

A. This petition for a writ of certiorari presents a simple question: Does a Citizen have a duty to identify himself to a policeman when he knows or has reason to believe that by identifying himself he will be revealing information that will be used against him in a second unrelated prosecution? The Montana Supreme Court (App. 2 para. 3) cites as a finding of fact that Deputy Matkin wanted petitioner's name for the purpose of looking for arrest warrants. The petitioner stated that the reason he didn't give his name was that he was concerned that he had a warrant for a speeding ticket (doc. 36 page, 4). This would obviously make petitioners name the beginning link in a chain of evidence that could be used against him to convict him of a separate offense. The Montana Supreme Court struck down this defense (App. 5 para. 11), with the following:

> "A disclosure of a suspect's name will not implicate the self-incrimination clause if it presents "no reasonable danger of incrimination." *Hiibel*, 542 U.S. at 189, 124 S. Ct. at 2460. Allen asserted that he did not

> provide his name because he was afraid he would be arrested for outstanding speeding tickets. However, this allegation was unsubstantiated, as a criminal history and warrants check run on Allen after his arrest showed no outstanding warrants or criminal history. This being so, the act of providing his name provided no reasonable danger to Allen that he would incriminate himself, nor would it furnish a link in a chain of evidence which could be later used to prosecute him. *Hiibel*, 542 U.S. at 190, 24 S. Ct. at 2461. Thus, the disclosure of Allen's name to Deputy Matkin, under the circumstances of this case, would not have been incriminating".

This is backwards logic. According to the Montana Court, a person would have to first prove that there was a danger of incriminating oneself with their name, in order to gain the fifth amendment protection of not providing it due to its incriminating nature. According to the logic put forth by the Montana Court, one only has 5th amendment protection if there is absolute proof beyond a shadow of a doubt, that there is something incriminating with which to need its protection. Which in turn would imply that the person bring forth the incriminating evidence to gain the protection of the 5th amendment. Obviously, by then the damage is done. The U.S. Supreme Court declared that:

> "The privilege afforded not only extends to answers that would in themselves support conviction under a federal criminal statute but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal

crime.....*The claimant is not required to prove the precise danger since by so doing he would be forced to disclose those very facts from which the privilege protects. Hoffman v U.S. (CF 341 U.S. 479,486,71 CT. 814,818,95 L Ed 1118.* (1951)

"The (5th amendment privilege is not limited to testimony, as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate." Boyd vs. U.S._Supra; Brown vs Walker, 161, U.S. 591. (1896)

The United States Supreme Court stated further that all rights and safeguards contained in the first eight amendments to the federal constitution are equally applicable in every state criminal action, "Because a denial of them would be a denial of due process of law." William Malloy vs Patrick J. Hogan, 378 U.S. 1, 84 S. Ct. 1489. Argued March 5, 1964, decided June, 15, 1964.

Where rights secured by the constitution are involved, there can be no rulemaking or legislation which would abrogate them." Miranda v. Arizona 384 U.S. 436 at 491. (1966)

"The claim and exercise of a constitutional right cannot be converted into a crime." Miller v. U.S. 230 F 486 at 489.

Officer Matkin admits that he wants Petitioner's name in case he discovers some offense later, in order to find him (App. 11 para.6). Petitioner has brought up (doc. #36 page4) an extreme example

of a name being incriminating or being the beginning link in a chain of evidence: if a Middle Eastern man with a beard was stopped and questioned about his name, and he said he was Osama Bin Laden, he would be arrested immediately. Petitioner hopes it is obvious to the learned court, all of the possible occasions in which a name could easily be the beginning link in a chain of evidence to convict him of a separate offense. Petitioner would also ask the Court to take notice that the factual circumstances in *Hiibel* are arguably distinguishable from those of Petitioner's. They are different in that in Hiibel's case, officers were notified of a disturbance and called out to a scene. In Petitioner's case, the officer's were acting in their own unfettered discretion. Nevada law also specifically requires a person to identify themselves to a peace officer, the language in the Montana statute as discussed below, indicates just the opposite. Petitioner resents the repeated attempts to bootstrap Nevada law to him.

B. Montana, unlike other states has no specific law requiring one to identify oneself to a peace officer on demand. Petitioner brought this up during the proceedings in justice court (doc.# 14.0) and the State responded with M.C.A 46-5-401 as the law that requires this (doc.# 15). ` In fact the language in M.C.A 46-5-401. Investigative stop and frisk indicates the intent of the lawmaker is not to require a name when on foot.: (1) In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of a vehicle has committed, is committing or is about

to commit an offense.....(2) A peace officer who has lawfully stopped a person or vehicle under this section may: (a) request the person's name and present address and an explanation of the person's actions and, if the person is a driver of a vehicle, demand the person's drivers license and the vehicle's registration and proof of insurance.....

The petitioner would ask the Court to take note of two different words, request and demand, in the same sentence, both pertaining to the reason for the initial stop. The word demand is used when the person is the driver of the vehicle. The word demand if looked up in a legal dictionary, gives a corresponding legal duty to supply what is demanded. Defendant agrees 100% that due to the contractual nature of having a drivers license that the word demand is appropriate, and there is a legal duty to supply it. This same contractual duty extends to taking a breathalyzer when you have a driver's license. However the word request is used in circumstances other than driving such as the Petitioner being on foot. A look at the word request in a legal dictionary shows no corresponding legal duty to supply that which is requested. Notice that the person's name, address and an explanation of the person's actions all fall under the word request. As an example, if the person were engaged in an illegal activity, and the officer requested an explanation of his actions, that person would be under the 5th amendment and would have no corresponding duty to confess, and could not be punished for failing to explain to the officer what he was doing. If the lawmakers had intended to make it mandatory for people to give their name to an officer, they would have used the word demand instead of request.

Petitioner has brought this up in the pleadings, in his Answer and Demurr to complaint (doc# 36) and at the preliminary hearing (page 40-43). Montana has no law requiring one to identify oneself to an officer, thus Petitioner is being punished for a "noncrime" just as if he had plead into a fiction of law.

C. M.C.A. 45-7-302. Obstructing a peace officer or other public servant, by way of allowing the State to charge Petitioner with a crime for refusing to identify himself, automatically implies that it imposes a duty to identify oneself to a peace officer, even though it doesn't declare that in writing. Thus even though it broadly defines obstruction, the District Court and the State are construing it to compel specific performance not specifically mentioned. This is what makes it vague and ambiguous under the 14th amendment. M.C.A 45-7-302. Obstructing peace officer or other public servant, as being construed by the District court is even more unconstitutionally vague than Kolender v. Lawson, or Brown v. Texas, as at least the States (California and Texas respectively) had laws on the books to demand a name or I.D. The petitioner, being a layman sees no standard of conduct in relation to providing ones name to a peace officer. The requirement that "a person, who loiters and wanders upon the streets, must present a "credible and reliable identification" and account for their presence when requested by a peace officer under circumstances that would justify a Terry stop was declared unconstitutionally vague. *Kolender v. Lawson*, 461 U.S. 353 (1983) (order denying motion to dismiss App. 14 para.8). The Statute was vague under the 14th amendment because it failed to clarify

what is contemplated by the requirement that a suspect provide credible and reliable information. What the Petitioner is trying to articulate is that at least the California statute had some sort of a requirement for I.D. where M.C.A 45-7-302 makes no such requirement at all, and doesn't specifically say that failure to provide a name or I.D. is an obstruction. It would seem to Petitioner, that if the California statute is struck down because it doesn't have enough specificity in telling you exactly what kind of I.D. is required, then M.C.A. 45-7-302 as it is being applied to Petitioner in this case would have even greater reason to be struck down, since it mentions no form of I.D. at all. The District Court cites *Custody and Parental Rights of D.S.*, 2005 MT 275 P's 15 & 16. "The person challenging a statue as vague must prove that no standard of conduct is specified at all". Petitioner maintains that M.C.A 45-7-302 doesn't prove any standard of conduct at all in regards to refusal to identifying oneself as a crime, or a duty to identify oneself. Also cited in this argument "A statute is void for vagueness in Montana if it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden ". Petitioner is a person of ordinary intelligence and would think he has the Miranda right to silence, thus exercising that right is not a crime. M.C.A. 45-7-302 is written so broadly that a person who is guilty of murder, but refuses to confess during an interrogation would be guilty of obstruction. However he would obviously be well within his Fifth Amendment right to not confess.

D. The Petitioner was under arrest before being asked his name, thus his Miranda right to silence began at that time. Petitioner contends that being

placed in the dirt face down and handcuffed easily meets any definition of arrest. The state contends that this was just a terry stop and Matkin put handcuffs on for his own protection, even thought Matkin admits he had the Petitioner in custody (police report). Matkin could have used the word arrest just as easily as custody.

> "A Terry stop or seizure cannot resemble a traditional arrest" *Dunaway v. New York,* 442 U.S. 200, 212 (1979)
>
> "There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v. Arizona,* 384 U.S. 436,467 (1966).
>
> "The Officer may ask the terry detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond" *Berkemer v. McCarty,* 468 U.S. 420,439 (1984).

The State insists that this was just a Terry Stop, and not an arrest, but nowhere in Terry is mention made of placing someone face down in the dirt in handcuffs. The actions of Deputy Matkin converted this into an arrest before any questions were asked. Defendant, being a layman, and not a licensed attorney who has gone to law school for 7 years, understands the word anything in the Miranda Warning to mean just that. The warning is designed

to make it easy for the average man on the street to understand its meaning. If the Miranda Warning has exceptions then it should be reworded, otherwise the common man on the street will have to go to law school to understand what those exceptions are and when they apply.

2. The Montana Supreme Court denied Petitioner equal protection and due process under the First, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, by not allowing him to testify in his own defense at trial. This petition for writ of certiorari presents a simple question: may the State of Montana deny a defendant equal protection and due process by not allowing him to testify due to his religious beliefs? Petitioner filed a document "notice of refusal to swear an oath or affirm" nearly one month ahead of trial, citing his religious beliefs and relevant federal case law, (App. 22). At trial, when petitioner is not allowed to testify, Judge Rice admits he didn't even bother to read the notice (trial transcripts page38-39). The Montana Supreme Court claims that no denial of equal protection and due process took place and that petitioner failed to provide legal authority or argument to support his contentions (App. 7 para. 14). Petitioner cites the verse out of the bible that prohibits anything beyond a yes or no answer. Petitioner then cites Gordon v. Idaho, 778 F.2d 1397, 1400-01 9th Cir.(1985). Gordon also refused to take an oath or affirm due to religious beliefs and wasn't allowed to testify. The 9th circuit ruled that the District Court erred by not probing to find a way for Gordon to testify that would not offend his religious beliefs, and subsequently reversed. In Petitioner's case, the District Judge had plenty of time to read the notice, look up Gordon v. Idaho, and

do the same thing to allow petitioner to testify. This denial of equal protection and due process should by itself be enough reason to reverse.

CONCLUSION

This petition presents an opportunity in which to better understand Miranda rights, and further define the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. The opinion below is clearly erroneous as a matter of law, fails to comport with reason, logic and common sense, conflicts with the 9th Federal Circuit, intent of Montana lawmakers, and most importantly previous case law of this Court. So as to protect the Constitution and laws of the United States, and prevent a slide down the slippery slope to a police state, Petitioner prays that this Court issue a writ of certiorari and vacate the judgment of the Montana State Supreme Court.

Respectfully submitted,

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DA 08-0249
IN THE SUPREME COURT OF THE STATE OF MONTANA 2009 MT 90N

STATE OF MONTANA,
Plaintiff and Appellee,
v.
JOSH A. ALLEN,
Defendant and Appellant.

APPEAL FROM: District Court of the Twelfth Judicial District, In and For the County of Hill, Cause No. DC-2007-110 Honorable David G. Rice, Presiding Judge
COUSEL OF RECORD:
For Appellant: Josh A. Allen, (self represented), Havre, Montana
For Appellee: Hon. Steve Bullock, Montana Attorney General, Mark W. Mattioli, Assistant Attorney General, Helena, Montana
Cyndee L. Peterson, Hill County Attorney, Lindsay A. Osbourne, Deputy County Attorney, Havre, Montana

Submitted on briefs: February 25, 2009
Decided: March 24 2009

Justice Patricia O. Cotter delivered the Opinion of the Court.

1. Pursuant to Section I, Paragraph 3(d)(v), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003, the following memorandum decision shall not be cited as

precedent. It shall be filed as a public document with the Clerk of the Supreme Court and its case title, Supreme Court cause number and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

2. Josh A. Allen (Allen) appeals his conviction for obstructing a peace officer, a misdemeanor in violation of 45-7-302, MCA, in the Twelfth Judicial District Court, Hill County. For the reasons set fourth below, we affirm Allen's conviction.

3. On March 22, 2007, at approximately 2:15 a.m., Hill County Deputy Sheriff Cory Matkin (Deputy Matkin) was on routine patrol in Havre, Montana. Deputy Matkin noticed a male, who later turned out to be Allen, walk from the vicinity of Kentucky Fried Chicken restaurant and duck out of sight into a hedge at the corner of a nearby office building. Deputy Matkin drove by the building and saw the same person run into an alley at fairly high speed. Deputy Matkin suspected that the person had seen him and was running away to avoid detection and contact with an officer, so he followed him in his patrol car. As Deputy Matkin later testified, he wanted to stop the individual to determine why he was running from him, suspecting that his evasion might be because of a warrant, violation of probation or pretrial release conditions, or because he had committed an offense in the area.

4. Deputy Matkin eventually caught up with Allen, and activated the siren on his patrol car. Allen stopped and dropped to the ground at Deputy Matkin's request. Deputy Matkin then placed Allen in handcuffs, as his past experience with people who run from officer suggested they were likely to fight.

Allen made no threatening moves and did not struggle with Deputy Matkin.

5. Deputy Matkin then asked Allen why he had been running. Allen asked Deputy Matkin if he was under arrest or being detained, and Deputy Matkin responded that it was a detention. According to the District Court's factual findings in this matter, when Allen was "told it was a detention, he said he was exercising his right not to incriminate himself." When Deputy Matkin asked Allen his name, Allen refused to provide it. Deputy Matkin informed Allen that he was investigating his reason for running from him, and that he was obstructing the investigation by refusing to talk to him. When Allen continued to refuse to provide his name, Deputy Matkin arrested him for obstructing a peace officer.

6. Allen was subsequently convicted in justice court, and appealed to the District Court for a de novo bench trial. Prior to trial, Allen filed a motion to dismiss the obstructing charge on the grounds that Deputy Matkin lacked probable cause to arrest him and that his constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution were violated by his arrest and the charge itself. The District Court Denied the motion. The District Court concluded that there was particularized suspicion to detain Allen based on the circumstances of the case. The District Court also reasoned that Allen's running from Deputy Matkin, couple with his refusal to provide his name after being told of the investigation, provided probable cause to arrest and charge him with obstructing. Additionally, the District Court rejected Allen's arguments that he had a constitutional right not to provide Deputy

Matkin with his name, and that the obstructing statute was unconstitutionally vague.

7. At trial, Allen refused to take an oath or affirm based on his personal religious beliefs, and was not allowed to testify. Allen was subsequently convicted at bench trial and this appeal followed.

8. Allen raises a number of issues on appeal which we restate as follows. First, Allen asserts that Deputy Matkin did not have particularized suspicion to detain him or probable cause to arrest and charge him. Second, Allen asserts that his refusal to provide his name to Deputy Matkin was protected by the self-incrimination clause of the Fifth Amendment of the United States Constitution. Third, Allen maintains that the obstructing statute under which he was convicted is unconstitutionally vague. And fourth, Allen maintains that he was denied equal protection and due process when the District Court refused to allow him to testify based on his refusal to take an oath or affirm.

9. The grant or denial of a motion to dismiss in a criminal case presents a question of law which we review de novo. *State v. Howard,* 2008 MT 173, Para.8, 343 Mont. 378, 184 P.3d 344. Our review of a motion to dismiss is plenary, and we determine whether the district court's conclusions of law are correct. *Howard,* Para. 8. Any findings of fact in support of a district court's denial of a motion to dismiss are reviewed under the clearly erroneous standard. *Howard*, Para. 9.

10. We conclude the District Court did not err in denying Allen's motion to dismiss. We agree with the District Court that there was particularized suspicion to justify the stop of Allen and probable

cause to arrest him for obstructing. Particularized suspicion is based on objective data from which an officer can infer that the person stopped is or has been engaged in wrongdoing. *Brown. v. State*, 2009 MT 64, Para. 20,___Mont.___,___P.3d___. Whether particularized suspicion is present is based on the totality of the circumstances. *State v. Fellers*, 2004 MT 321, Para. 21, 324 Mont. 62, 101 P.3d 764. Probable cause to arrest is established when the facts and circumstances within an officer's personal knowledge are sufficient to warrant a reasonable person to believe that someone is committing or has committed and offense. *State v. Williamson*, 1998 MT 199, Para. 12, 290 Mont. 321, 965 P.2d 231. Here, Allen's evasive behavior at 2 a.m. provided sufficient particularized suspicion for Deputy Matkin to detain him, and his ensuing refusal to provide his name supplied probable cause to arrest and charge him with obstructing under these circumstances.

11. In this connection, we also agree with the District Court that Allen's right against self-incrimination did not protect him from having to provide his name to Deputy Matking. The privilege against self-incrimination protects an individual from being compelled to implicitly or explicitly disclose information or relate factual assertions of an incrimination nature. *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humbolt Co., 542 U.S. 177, 189, 124 S. Ct. 2451, 2460 (2004).* A disclosure of a suspect's name will not implicate the self-incrimination clause if it presents "no reasonable danger of incrimination." *Hiibel*, 542 U.S. at 189, 124 S. Ct. at 2460. Allen asserted that he did not provide his name because he was afraid he would be arrested for outstanding speeding tickets. However, this

allegation was unsubstantiated, as a criminal history and warrants check run on Allen after his arrest showed no outstanding warrants or criminal history. This being so, the act of providing his name provided no reasonable danger to Allen that he would incriminate himself, nor would it furnish a link in a chain of evidence which could be later used to prosecute him. *Hiibel,* 542 U.S. at 190, 24 S. Ct. at 2461. Thus, the disclosure of Allen's name to Deputy Matkin, under the circumstances of this case, would not have been incriminating.

12. We also agree with the District Court that the obstructing statute under which Allen was charged and convicted was not unconstitutionally vague. This statute reads as follows:

Obstructing peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant it the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of peace, or the performance of a governmental function, including service of process. (2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

Section 45-7-302)(1)and(2), MCA.

13. We presume statutes are constitutional, and the party challenging a statute bears the burden of proving the statute's invalidity beyond a reasonable doubt. *In re Custody and Parental Rights of* D.S., 2005 MT 275, Para. 15, 329 Mont. 180, 122 P.3d 1239. A statute is vague on its face if it fails to give a person of ordinary intelligence fair notice that her

contemplated conduct is forbidden. *Custody of* D.S., Para. 16. The party challenging a statute for vagueness faces a high burden of proof in showing that the statute specifies "no standard of conduct....at all" which is prohibited. *Custody of D.S., Para. 16 (quotation omitted).* We agree with the District Court that Allen failed to meet his high burden. The obstructing statute does give fair notice to a person of ordinary intelligence of the prohibited conduct and is not unconstitutionally vague.

14. Finally, we conclude that the District Court did not deny Allen his equal protection or due process when it required him to take an oath or affirm as a precondition to testifying in court. M.R. Evid. 603 states that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfull, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." *See also Gordon v. Idaho,* 778 F.2d 1397, 1400-01 (9th Cir. 1985) (discussing the federal counterpart to M.R. Evid. 603). Allen has simply failed to show that the imposition of the oath or affirmation requirement of M.R. Evid. 603 has denied him equal protection of the laws, due process, or otherwise impinged upon his rights. While Allen asserts that certain tenets of his faith prevent him from complying with this rule, he has provided no legal authority or argument to support his contention that he should be completely excused from the oath or affirmation requirement in M.R. Evid. 603 prior to giving testimony in court.

15. We have determined to decide this case pursuant to Section 1, Paragraph 3(d)(v) of our 1996 Internal Operating Rules, as amended in 2003,

which provides for memorandum opinions. It is manifest on the record before us that the District Court did not err in its disposition of this matter when it denied Allen's motion to dismiss and subsequently convicted him of obstructing. Therefore, we affirm.

Hon. David G. Rice
District Judge
Hill County Courthouse
Havre, MT 59501
Tel: 406-265-5481, Ext 231

2008 March, 27

MONTANA TWELFTH JUDICIAL DISTRICT COURT, HILL COUNTY

THE STATE OF MONTANA	)Cause No. DC-07-110
Plaintiff,	)
Vs	) **ORDER DENYING**
JOSH ABEL ALLEN,	) **MOTION TO**
Defendant.	) **DISMISS**

STATEMENT OF THE CASE: Defendant appeals a conviction in Hill County Justice Court for the offense of Obstructing a Peace Officer. He filed a motion to dismiss the charge in this Court because he feels the officer lacked probable cause and his 1st, 4th, 5th, and 14th Amendment rights were violated by the charge. The State resists the motion and argues that there was particularized suspicion for the stop, probable cause for the arrest, and no reason to dismiss the charge for constitutional reasons. Essentially, Defendant argues that he could not be required to give his name to the officer an if the statute requires that, it is unconstitutionally vague. The Court received evidence at a hearing on March 3, 2008. Hill County Deputy Sheriff Cory Matkin

testified and was cross-examined by Defendant, who appeared without counsel. Hill County Deputy County Attorney Lindsay Osbourne appeared for the State. Both parties filed briefs before the hearing so the Court considers the matter submitted for decision.

ISSUES:

1. Whether particularized suspicion justified detention of Defendant.

2. Whether probable cause supported issuance of the complaint.

3. Whether Defendant had a constitutional right to refuse to give his name to an officer.

4. Whether 45-7-302, MCA, is unconstitutionally vague.

FINDINGS OF FACT: In addition to any finding of fact stated on the record at the hearing of this motion, the Court enters the following findings:

1. Deputy Matkin was on patrol at about 2:15 a.m. on March 22, 2007, in the west end of Havre, Hill County, Montana. Matkin is an experienced officer with a number of years of service and training for his current position of Deputy Sheriff.

2. In the area of Kentucky Fried Chicken and the professional office of Dr. Beardsley, Matkin saw a male walk across from KFC and then duck out of sight into a hedge at the northwest corner of the professional building. As Matkin drove near the building, the person ran along the north side, turned south, and then ran west into the alley at a high speed run.

3. As Matkin suspected the person had seen him and may be running to avoid detection and contact with an officer, he drove around the professional building and followed the person down the alley. Matkin wanted to stop the person and determine why he was running away. He suspected the person's evasion might be because of a warrant, probation conditions, pretrial release conditions, or that he was an offender for some offense in the area.

4. As Matkin caught up to the person behind KFC, across the street from the professional building, he hit his siren. The person then stopped and got on the ground as requested by the deputy. He placed the person in handcuffs as his experience with people who run suggested they could be fighters. The person made no threatening moves and did not struggle with the officer.

5. When Matkin asked the person why he was running away, he asked the deputy if this was a detention or arrest. When he was told it was a detention, he said he was exercising his right not to incriminate himself. Matkin then asked his name to check his status. Again the person refused to answer saying that he was not talking to the officer.

6. Deputy Matkin then told the person that he was investigating his reason for running and he was obstructing that investigation by refusing to talk to him. Matkin wanted to determine the person's identity and detain him if necessary. In addition, by detaining him, he could check the area for evidence of an offense and know his identity if later investigation connected to him to any offense. Even

after Matkin told the person he was obstructing him by refusing to tell him his name, he refused to tell him.

7. Matkin then arrested the person for refusal to tell him his name. He later found out the Defendant's name after he was taken to the detention center. Deputy Matkin then issued him a ticket in violation of 45-7-302 MCA, in Hill County Justice Court and stated that Defendant obstructed a peace officer "by fleeing from a deputy on foot and failing to identify himself upon apprehension". (See notice to Appear and Complaint).

LEGAL PRINCIPLES:

1. The Court has jurisdiction over this matter. Montana requires that a peace officer stop a person only after the officer has developed a particularized suspicion to warrant the stop.46-5-401 (1), MCA. To paraphrase "particularized suspicion" , an officer must have objective facts from which an experienced officer can make inferences that lead to a suspicion that a person has committed, is committing, or is about to commit an offense. *State v. Gopher,* 193 Mont. 189, 194, 631 P.2d 293, 296 (1981). It continues to be reaffirmed that the totality of the circumstances surrounding the stop are to be considered. *State v. Grindeland,* 2001 MT 196, 306 Mont. 262, 265, 32 P.3d 767.

2. "A peace officer who has lawfully stopped a person or vehicle under this section may: (a) request the person's name and present address and an explanation of the person's action...."46-5-401 (2) (a),

MCA. There is no criminal penalty attached to this statute.

3. " A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace or the performance of a governmental function, including service of process. 45-7-302 (1), MCA.

4. "When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine the complaint or any affidavits, if filed, to determine whether probable cause exists to allow the filing of a charge." 46-11-110 MCA. "The charge must be in writing and in the name of the state or the appropriate county or municipality and must specify the court in which the charge is filed. The charge must be plain, concise, and definite statement of the offense charged, including the name of the offense, whether the offense is a misdemeanor or felony, the name of the person charged, and the time and place of the offense as definitely as can be determined. The charge must state for each count the official or customary citation of the statute, rule regulation, or other provision of laws that the defendant is allege to have violated." 46-11-401, MCA.

5. "Probable cause to arrest is established if the facts and circumstances within an officer's personal knowledge....are sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense". State v. Williamson, 1998 MT 199 Para. 12.

6. " Sections 45-2-101 (34) (statutory definition of "knowingly") and 45-7-302 (1), MCA, require that an individual obstructing a peace officer must engage in conduct under circumstances that make him or her aware that it is highly probable that such conduct will impede the performance of a peace officer's lawful duty. In other words, the City had to prove that Cameron was aware that his conduct would hinder the execution of the Officer's duties." *City of Kalispell v. Cameron,* 2002 MT 78, Para. 11. "One may obstruct an officer by refusing a request to state one's name and address, to produce identification, or to show a driver's license. However, this assumes that the failure hindered the officer in performing a duty." 58 Am Jur 2d "Obstructing Justice" 62.

7. In *Brown v. Texas,* 443 U.S. 47 (1979), a conviction for Defendant's failure to identify himself was overturned because the officers who made the arrest did not have any reasonable suspicion to suspect Defendant of any criminal conduct.

8. The requirement that a person, who loiters and wanders upon the streets, must present a "credible and reliable identification" and account for their presence when requested by a peace officer under circumstances that justify a *Terry* stop was declared unconstitutionally vague. *Kolender v. Lawson,* 461 U.S. 353 (1983). The statute was vague under the 14th Amendment because it failed to clarify what is contemplated by the requirement that a suspect provide credible and reliable identification. Too much discretion was placed in officers so that the average

person could not determine compliance with the law. A statute is void for vagueness in Montana if it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden. The person challenging a statute as vague must prove beyond a reasonable doubt in that no standard of conduct is specified at all. *Custody and Parental Rights of D.S.*, 2005 MT 275 Para. 15 &16.

9. The disclosure of a Defendant's name and other expressions of a voice is not testimonial and therefore neither suppressible nor in violation of *Miranda*. *State v. Devlin,* 1999 MT 90 Para. 21. There is no violation of the right to remain silent, unreasonable search and seizure, of violation of free speech.

ANALYSIS: Defendant has requested dismissal of the Complaint in a pre-trial setting. The Court can easily find that particularized suspicion existed for Deputy Matkin to stop Defendant. At that late hour, a person who runs when a police car is present warrants contact. While the person may not be involved in any criminal activity, the officer has a duty to be sure he is not wanted or in violation of release conditions. In addition, the officer has a legitimate reason to identify the person in case some offense is later discovered. Deputy Matkin's reasons for stopping Defendant are very reasonable in light of his experience. While it is not an offense to run unless Defendant knows that the officer is after him, running from an officer is certainly a suspicious activity at that time of night. All that must be found for particularized suspicion is present as Deputy Matkin pursued Defendant. Beyond that, once his name was requested and he was told that Matkin

was investigating his reason for running, he knew that he could be charged with obstruction. There does not need to be an actual crime for the officer to do his duty in checking out the reason for Defendant's furtive movements. The running couple with refusal to give a name after being told of the investigation establishes probable cause to charge the offense. Whether Defendant is actually guilty will be determined at trial. For now, a reasonable person could easily find grounds to believe that Defendant violated the statute by refusing to give his name after being told that he was detained to learn the reason for his running. He has no valid constitutional right to refuse to merely give his name. That was all that was asked.

Defendant's challenge to the constitutionality of the statute is not supported. The cases he cites do not support his argument. Particularized suspicion is present here so *Brown* does not apply. The Supreme Court never reached the constitutionality of the statute in Texas. The Montana statute clearly requires the State to prove a person knowingly violates the law by acts that obstruct, impair, or hinder enforcement of the criminal law, preservation of the peace, or the performance of a governmental function. Nothing could be plainer for a person who runs from an officer to know that the officer wants to know why he is running. Whether he is actually guilty is for trial. However, the officer must establish the obstruction and show what is being interfered with by a defendant's acts. There are a number of cases like *Cameron*, where the acts of a defendant do not reach that level and the charges must be dismissed. That is not the case at this stage of this pre-trial proceeding as the Court has not yet

heard the State's case. Defendant's citation to *Kolender* is also not persuasive as the Montana statute requires the officer to show that his activity meets the statute and Defendant's acts obstruct that activity. The Montana statute has been in place for many years without challenge to its constitutionality for vagueness. In this case, it is not merely the running that resulted in the charge, but the running and later refusing to answer a simple question about his name. While Defendant promptly stopped, and is not guilty of anything at that stage, once he knew that the officer was investigating his activity and wanted to know his name, he was on notice that the officer was performing his duty. Whether he obstructed the officer's duty is for trial. However for now, the charge will not be dismissed.

CONCLUSIONS OF LAW:

1. Particularized suspicion was present for the stop of Defendant and probable cause to charge him arose after the stop.

2. Defendant had no constitutional right to refuse to give his name to Deputy Matkin.

3. 45-7-302, MCA, is not unconstitutionally vague.

Based on the above Findings and Conclusions of Law, Defendant's motion to dismiss is DENIED. This matter will proceed to trial before the Court without a jury.

DATED this 26th day of March, 2008 District Judge

Hon. David G. Rice
District Judge
Hill County Courthouse
Havre, MT 59501
Tel: 406-265-5481, Ext 231

2008 March, 28

MONTANA TWELFTH JUDICIAL DISTRICT COURT, HILL COUNTY

THE STATE OF MONTANA)Cause No. DC-07-110
Plaintiff,)
Vs) **JUDGEMENT**
JOSH ABEL ALLEN,)
Defendant.)

This matter came before the Court for bench trial on March 27, 2008. Defendant appeared Pro Se and the State was represented by Lindsay A. Osbourne, Deputy Hill County Attorney.

Testimony was presented, and the court found defendant guilty of Obstruction a Peace Officer, a misdemeanor. Therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as follows:

1. Defendant is guilty of the offense of **Obstructing a Peace Officer, a misdemeanor,** in violation of 45-7-302, MCA.

2. Imposition of sentence is deferred for six (6) months, subject to the following conditions:

a. Defendant shall pay a fine of $100.00, with credit for time previously served, thus discharging the fine.

b. Defendant shall pay the mandatory $15.00 prosecution fee, $50.00 victim's fee and $20.00 surcharge.

c. Defendant shall remain law abiding.

d. Defendant must keep in contact with the Hill County Attorney's office and notify them of any change of address.

3. Sentence is stayed pending appeal to the Montana Supreme Court.

ORDERED from the bench the 27th day of March, 2008. Dated this 28th day of March, 2008.

JUDGE OF DISTRICT COURT

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 08-0249

FILED MAY 12, 2009

STATE OF MONTANA,

Plaintiff and Appellee

v.

JOSH A. ALLEN,

Defendant and Appellant.

Petitioner Josh A. Allen, appearing as a self-represented litigant, has filed a Petition for Rehearing in the captioned matter, and the State of Montana has filed a response objecting to the Petition. Due consideration having been given to the Petition, IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED. IT IS FURTHER ORDERED that the Clerk of this Court serve a copy of this Order upon counsel of record and upon Allen at his last known address. Dated this 12 day of May, 2009.

1st Amendment U.S. Constitution. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5th Amendment U.S. Constitution. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment U.S. Constitution. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

14th Amendment U.S. Constitution. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45-7-302. Obstructing peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant, including a person serving process, shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

46-5-401. Investigative stop and frisk. (1) In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense. If the stop is for a violation under Title 61, unless emergency circumstances exist or the officer has reasonable cause to fear for the officer's own safety or for the public's safety, the officer shall as promptly as possible inform the person of the reason for the stop.

(2) A peace officer who has lawfully stopped a person or vehicle under this section may:

(a) request the person's name and present address and an explanation of the person's actions and, if the person is the driver of a vehicle, demand the person's driver's license and the vehicle's registration and proof of insurance; and

(b) frisk the person and take other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to the officer or another person present. The officer may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe that the object is a deadly weapon until the completion of the stop, at which time the officer shall either immediately return the object, if legally possessed, or arrest the person.

(3) A peace officer acting under subsection (2) while the peace officer is not in uniform shall inform the person as promptly as possible under the circumstances and in any case before questioning the person that the officer is a peace officer.

Josh A. Allen

P.O. box 1621

Havre, MT 59501

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MONTANA TWELFTH JUDICIAL DISTRICT, HILL COUNTY HONORABLE DAVID G. RICE DISTRICT JUDGE HILL COUNTY COURTHOUSE HAVRE, MONTANA

THE STATE OF MONTANA plaintiff	)CAUSE NO. DC-07-) 110
vs Josh A. Allen defendant	NOTICE OF REFUSAL TO SWEAR *OR AFFIRM OR TAKE AN OATH*

COMES NOW the Defendant, Josh A. Allen, to enter a NOTICE OF REFUSAL TO SWEAR OR TAKE AN OATH, to wit: According to the Defendant's truly and sincerely held religious beliefs from the bible the Defendant cannot swear or take an oath. The Defendant cannot Affirm either, as this is synonymous with swearing, this issue was taken before the court in Gordon v. Idaho. The Defendant would ask the court to accept this as dicta, and respect the Defendant's religious beliefs in this preliminary hearing and trial. *The bible instructs in the book of James, 5:12 "But above all, my brethren, do not swear, either by heaven or by earth or with any other oath, but let your yes be yes and your no be no, that you may not fall under condemnation".*

This instruction is repeated at Matthew 5:33-5:37 "Again you have heard that it was said of the men of old, 'you shall not swear falsely, but shall perform to the Lord what you have sworn.' But I say to you, Do not swear at all, either by heaven, for it is the throne of God, or by earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for your cannot make one hair white or black. Let what you say be simply 'Yes' or 'No'; anything more than this comes from evil." The Defendant does agree to tell the truth, and it should be pointed out that swearing to tell the truth, or taking an oath hasn't stopped anyone from lying anyway.

Dated this 29th day of February, 2008

Respectfully Submitted

Pro Se

147

(2)

No. 09-239

Supreme Court, U.S.
FILED
DEC 3 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSH A. ALLEN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

Although framed differently by Petitioner, Allen's Petition asks this Court to grant a writ of certiorari to review three issues, which the Respondent has restated as follows:

1. Whether the Montana Supreme Court's determination that Allen did not face a real or reasonable danger of incrimination is consistent with *Hiibel v. Sixth Jud. Dist. Ct. of Nevada*, 542 U.S. 177 (2004).

2. Whether Allen's referencing distinguishable Ninth Circuit precedent satisfied his burden of proving that his rights of equal protection or due process were violated when Allen declined to affirm to testify truthfully.

3. Whether Allen's reliance upon *Brown v. Texas*, 443 U.S. 47 (1979) and *Kolender v. Lawson*, 461 U.S. 352 (1983) rebutted the presumption of constitutionality accorded Montana's obstructing a peace officer statute.

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JURISDICTION

Allen's Fifth Amendment self-incrimination claim and his due process and equal protection claims fall within the Court's jurisdiction under 28 U.S.C. § 1257(a) because they assert rights or privileges arising under the Constitution of the United States. Allen's vagueness challenge draws into question whether a state statute is repugnant to the Constitution. *Id.*

STATUTORY PROVISIONS INVOLVED

This case involves the application of Mont. Code Ann. §§ 45-7-302 and 46-5-401. These statutes are set forth verbatim at R. App. 1-2.

STATEMENT OF THE CASE

Hill County Deputy Sheriff Cory Matkin (Deputy Matkin) was patrolling downtown Havre at 2:15 a.m. on a Thursday morning in March 2007, when he noticed Petitioner Josh A. Allen (Allen) walking in a southwesterly direction. 3/3/08 Tr. at 7. After turning left onto Fourth Avenue West – a route the deputy had already intended to take – Deputy Matkin observed Allen duck down behind a hedgerow and then duck out of sight and run east behind the northwest corner of an ophthalmology clinic building. He then made a right-hand turn around the northeast corner of the building and ran south. After

rounding the southeast corner of the building, Allen continued running down an alley westbound. The man was running "as hard as he could. . . ." 3/3/08 Tr. at 7-9, 16:12-15; 3/27/09 Tr. at 7-8. Order Den. Mot. to Dismiss, P. App. 10, FF 2; *State v. Allen*, 2009 MT 90N, ¶ 3, P. App. 2.

Deputy Matkin emphasized that Allen ducked "downward" and "[o]ut of sight[.]" 3/3/08 Tr. at 16:21-25, 17. The deputy saw that Allen was obviously trying to avoid detection because he was running in full flight away from Matkin's patrol vehicle. 3/3/08 Tr. at 17-18, 19:6-9. With 12 years experience in the field, training at the Montana Law Enforcement Academy, and 400 additional hours of advanced training, Deputy Matkin concluded this conduct was "[a]bsolutely" suspicious:

> It was very evident to me that he was trying to evade me, for some reason. I – usually when people are trying to evade law enforcement they are either a wanted person, be it a person with a warrant or a person on probation not supposed to be drinking, not supposed to be out at this hour, at 2:15 in the morning, a person on court conditions, a wanted fugitive. It could be a person that was in the process of committing a crime, had just committed a crime, was going to be committing a crime.
>
> Again, based on my experience, this person was actively trying to evade me and I felt that that warranted a contact stop to identify

> him and to determine what exactly it was that he was up to.

3/3/08 Tr. at 8:18-25, 9:1-9, 20:12-17; *Allen*, ¶ 3, P. App. 2. The Montana trial court, P. App. 15, and the Montana Supreme Court, P. App. 5, found that Deputy Matkin had sufficient particularized suspicion to conduct a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1969). Allen does not seek review of those findings in this Court.

Deputy Matkin caught up to Allen, activated his siren, requested him to get on the ground and placed him in handcuffs. Deputy Matkin took the latter action because "when people are fleeing from law enforcement, they also tend to be combative. It's very rare that we get engaged in a foot pursuit and not end up in some sort of wrestling match at the end of the foot pursuit." It was "an officer safety issue." 3/3/08 Tr. at 9:1, 10:1-17; Order Den. Mot. to Dismiss, FF 4, P. App. 11; *Allen*, ¶ 4, P. App. 2-3.

Deputy Matkin asked Allen why he was running. Allen responded by asking whether he was being detained or whether he was under arrest. Matkin "advised him at that time that it was a detention." Deputy Matkin repeatedly asked Allen to identify himself, but he refused. Deputy Matkin detected the odor of an alcoholic beverage. "I did advise him that, that at this point during my line of questioning I was conducting an investigation and that he was obstructing that investigation." 3/3/08 Tr. at 11-12:1-8, 22:2-4, 27:14-17; Order Den. Mot. to Dismiss, FF 5, P. App. 11; *Allen*, ¶ 5, P. App. 3.

After warning Allen that he would be arrested if he persisted in refusing to provide his name, the deputy escorted him to his patrol car and conducted a pat-down search incident to arrest, removing a Leatherman[1] and keys from Allen's pocket. The deputy did not remove Allen's wallet because it was obvious that the item was a wallet rather than a weapon and the deputy did not believe he had authority "to remove a wallet that may contain something incriminating." 3/3/08 Tr. at 12:10-21, 22:12-18, 24:6-13. Allen has conceded that the investigation lasted only a matter of minutes. Appellant's Br. at 5.

While conducting the pat-down search for officer safety, Allen attempted to "hook" Deputy Matkin's leg with one of his legs – "a maneuver that is indicative of a pending assault or escape attempt." 3/3/08 Tr. at 12:19-25. Deputy Matkin then placed Allen in the patrol car, stating that the jail would find out who he was. Preoccupied with the suspect, Deputy Matkin asked another officer "to drive through the area and check the businesses and the cars in the area, to make sure that everything was okay." 3/3/08 Tr. at 13:6-17. The other officer did not find anything suspicious and Deputy Matkin did not discover any warrants or probation status or anything to explain Allen's behavior: "So at the end of it, it was kind of a

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[1] A Leatherman is a multipurpose tool that contains, among other things, knife blades.

mystery as to why he was running." 3/3/08 Tr. at 13-14:9-14.

Jail personnel discovered that the man Deputy Matkin had arrested was Petitioner Josh A. Allen. Deputy Matkin charged Allen with misdemeanor obstructing a peace officer. 3/3/08 Tr. at 14:1-10. The notice to appear and complaint states: "Obstructing a Peace Officer: Fleeing From Deputy on Foot & Failing to Indentify Himself Upon Apprehension." Allen was 29 years old. Notice to Appear and Compl., R. App. at 3; Order Den. Mot. to Dismiss, FF 7, P. App. 12.

Deputy Matkin explained why he believed he needed to identify Allen:

> Let's say that a business was broken into down there. I had a person in that area and I stopped that person. Now, the person obviously was trying to evade me, to run from me, trying to escape the situation or the area. Now, I stopped that person and I can't identify him. So then I release him. And then ten minutes later I find that a business has been broken into and a car has been broken into in the immediate area. That again, goes back to why it was imperative that I obtain your ID.

3/3/03 Tr. at 29:15-25, 32-33; Order Den. Mot. to Dismiss, FF 6, P. App. 11. Allen's refusal to identify himself "kept . . . [Deputy Matkin] from pursuing the matter and he had to have other officers do that." 3/3/08 Tr. at 31:14-16.

Allen appended Deputy Matkin's police report to motions and pleadings he filed in justice and district court. The police report was consistent with Deputy Matkin's hearing testimony in district court. The report also reflects that Allen stated he was "out for a jog." Police Report at 1-2.

I. JUSTICE COURT PROCEEDINGS

Having chosen to represent himself, Allen waived his right to a jury trial, stating "there are no factual issues to be decided by a jury[,]" and "a jury cannot decide legal questions[.]" 5/2/07 Motion to Waive Jury Trial. Allen's list of trial exhibits consisted of Deputy Matkin's police report, decisions of this Court, and Montana statutes. 5/16/07 Notice of Witnesses and Exhibits.

While claiming that "[a]ll factual issues equal no crime[,]" Allen asserted that he was "accustomed to keeping odd hours and jogging at night, specifically because it is cooler at night and there is less traffic on the road." On this March 2007 morning, however, he claimed that he decided to "walk and jog" home after 2 a.m. because he had consumed three beers and "the DUI limit of .08 BAC is extremely low and [he] did not want to take a chance receiving a DUI driving home." Though claiming that he wanted to avoid contact with and harassment by the police, Allen opted to "jog down the alley." 4/30/07 Answer & Demurrer at 2.

In a later motion to dismiss, Allen argued that he was relying upon decisions of the Supreme Court of the United States when he refused to identify himself, but he had only recently been made aware of *Hiibel*. 5/29/07 Motion to Dismiss at 3, R. App. 9. Thus, after reading *Hiibel*, Allen alleged for the first time that "he was also concerned that he could have had an arrest warrant for an unpaid speeding ticket[.]" 5/29/09 Motion to Dismiss at 2, R. App. 8. Allen's brief in support of his motion to dismiss consisted of attached statutes, decisions of this Court, and Deputy Matkin's police report. 5/29/09 Br. in Support.

Allen was convicted following a bench trial and given a suspended sentence with credit for time served. 10/10/07 Judgment. Allen appealed, exercising his statutory right to a trial de novo in district court. Mont. Code Ann. § 46-17-311(1).

II. DISTRICT COURT PROCEEDINGS

In district court Allen once again waived his right to a jury trial, contending that "the alleged acts are not a crime," and, while there were "no relevant factual issues to be decided by a jury[,]" there were constitutional issues to be decided by a judge. D.C. Doc. 33, Waiver; D.C. Doc. 35, Omnibus Order.

Allen filed an answer and motion to dismiss similar to the one he had filed in justice court, reiterating that there were no factual issues to be resolved. D.C. Doc. 20, Answer at 1. He alleged that

in the past he "ha[d] been stopped, questioned, harassed and had I.D. or a name demanded of him while jogging at night, no less than 4 times." D.C. Doc. 20, Answer at 2. He argued that no evidence of a crime was discovered because "there was no crime . . . [he] was fleeing from. . . ." D.C. Doc. 20, Answer at 3. Indeed, Allen asserted that he did not tell Deputy Matkin he would not "incriminate" himself. Rather, he "simply stated to the officer he was exercising his rights." D.C. Doc. 54, Resp. to Pl.'s Resp. at 2. Allen contended that the investigative stop statute, Mont. Code Ann. § 46-5-401, was vague and ambiguous. D.C. Doc. 20, Answer at 4. Finally, Allen asserted that *Hiibel* was distinguishable because the officer in *Hiibel* had particularized suspicion of a specific crime. D.C. Doc. 20, Answer at 5.

Allen then filed a motion asking for a hearing to decide legal issues, noting that he had refused to enter a plea of not guilty because his conduct could not be a crime and that "[t]he issues that the defendant wants to argue are legal issues, not factual issues." D.C. Doc. 37, Motion at 1. While contending that he had a right not to reveal his name, Allen did "not dispute that the officer had both the right and duty to investigate any activity which the officer is concerned about potentially causing public harm." D.C. Doc. 54, Resp. to Pl.'s Resp. at 3.

At the hearing on Allen's motion to dismiss, addressing Allen's vagueness challenge to the investigative stop statute, the district court explained that the investigative stop statute is not a penal law.

3/3/08 Tr. at 41-42, 42:16-25. When the court asked whether Allen was claiming that the criminal statute was vague, Allen responded,

> I agree fully that the officer can ask whatever questions he wants and me not answering those may well cause him difficulty in an investigation. But my primary thrust of that is that my constitutional rights to remain silent, especially when I thought I was under arrest, in handcuffs and being concerned that anything that came out of my mouth might be incriminating.

3/3/08 Tr. at 55, 56:1-9.

Deputy Matkin testified at the hearing on Allen's motion to dismiss. Allen did not testify at the hearing or contend on the day of the hearing that he would not affirm to testify truthfully. After taking the matter under consideration, the trial judge issued findings of fact and conclusion of law denying Allen's motion to dismiss. Order Den. Mot. to Dismiss, P. App. at 9-17. The court concluded that the stop was supported by particularized suspicion and "[t]he running coupled with refusal to give a name after being told of the investigation, establish[ed] probable cause to charge the offense." The court rejected Allen's constitutional claims. P. App. at 14-17.

Consistent with his earlier hearing testimony, Deputy Matkin testified at trial regarding why he decided to stop, detain, and ultimately arrest and charge Allen with obstructing a peace officer. 3/27/09

Tr. at 5-22. Allen attempted to cross-examine Matkin regarding pretrial legal issues already decided, rather than factual matters bearing upon whether he knowingly obstructed an investigation. 3/27/09 Tr. at 22-23, 26-29. Allen then moved for a directed verdict, arguing that probable cause was lacking and that the prosecution failed "to prove that the police officer's need to investigate a crime overrides the Defendant's constitutional rights to remain silent." 3/27/09 Tr. at 28:11-14. Allen stated, "I don't argue that not giving my name might have obstructed Deputy Matkin, but again, here the issue at hand is whether my constitutional rights to remain silent are superior to that." 3/27/08 Tr. at 29:10-15. Allen conceded that Deputy Matkin believed he needed to conduct an investigation. 3/27/08 Tr. at 29:21-25.

The district court denied Allen's motion for a directed verdict, concluding that the prosecution had presented legally sufficient evidence. 3/27/08 Tr. at 34-35. Allen was then given the opportunity to give an opening statement: Allen cited "a couple experiences in the past," stated that he had read *Terry v. Ohio,* 392 U.S. 1 (1969), *Brown*, and *Kolender* prior to being stopped, and suggested he was concerned an arrest warrant had been issued for an unpaid speeding ticket. 3/27/08 Tr. at 36-38. Afterwards, Allen declined to testify because he would not affirm to testify truthfully, stating, "Well, I guess I'm not going to be able to testify, being affirming and swearing an oath are synonymous." 3/27/08 Tr. at 38:14-16, 39:9-11. Allen called the court's attention to

his notice that he would not swear or affirm to testify truthfully, which he had filed on the eve of the hearing on his motion to dismiss. Notice, P. App. 24-25. After being advised by the trial judge that Rule 603 of the Montana Rules of Evidence requires an "oath or affirmation administered in a form calculated to awaken the witness' conscience that impress the witness' mind with the duty to" testify truthfully, Allen stated that he would be unable to testify, citing his religious beliefs. 3/27/08 Tr. at 40-41.

After Allen declined to testify by affirmation, the trial judge stated that he had reviewed Allen's motion to dismiss, adding, "I will consider what you said before." When the judge invited Allen to provide additional factual reasons why he believed he was not guilty, Allen replied, "I didn't think we completely handled the legal questions." 3/27/08 Tr. at 43:1-10. Allen reiterated that his defense was legal in nature. 3/27/08 Tr. at 43:17-25.

Allen did not introduce evidence of an arrest warrant for supposedly failing to pay a speeding ticket or claim that he was innocent of an unresolved speeding violation if one existed.

The district court found that Allen knowingly obstructed a lawful police investigation. 3/27/08 Tr. at 50-51. The court deferred imposition of sentence, gave Allen credit for time in jail prior to release on bond, and stayed execution of the conditions of the sentence pending appeal. 3/27/08 Tr. at 53-55; Judgment, P. App. 18-19.

III. MONTANA SUPREME COURT APPEAL

On direct appeal, Allen continued to expand upon his extra-record allegations and arguments, including alleging for the first time that he had read pre-*Hiibel* precedent after talking to a law professor friend. Appellant's Br. at 4. He alleged for the first time that he observed the patrol vehicle "rapidly decelerate and turn without a blinker." Appellant's Br. at 7. Allen also disclosed that he did not appreciate the significance of testifying at trial until after he had consulted with an attorney. Appellant's Br. at 24, R. App. 15.

The Montana Supreme Court affirmed the district court's determinations that Deputy Matkin had particularized suspicion to detain Allen and "that Allen's running from Deputy Matkin, coupled with his refusal to provide his name after being told of the investigation, provided probable cause to arrest and charge him with obstructing." *Allen*, ¶¶ 6, 10, P. App. 3-5. The Court concluded that the Fifth Amendment privilege against self-incrimination did not protect Allen from having to provide his name because Allen was not facing a "reasonable danger of incrimination" for purposes of *Hiibel*. Allen's suggestion that he would be arrested for an unpaid speeding ticket "was unsubstantiated, as a criminal history and warrants check ran on Allen after his arrest showed no outstanding warrants or criminal history." Thus, "the act of providing his name provided no reasonable danger to Allen that he would incriminate himself, nor would it furnish a link in a chain of evidence

which could be later used to prosecute him." *Allen*, ¶ 11 (*citing Hiibel*, 542 U.S. at 190), P. App. 5.

The Court concluded that Allen had failed to meet his burden of overcoming the presumption of constitutionality accorded Montana's obstructing statute, Mont. Code Ann. § 45-7-302. *Allen*, ¶ 13, P. App. 6-7. The Court also concluded that Allen had failed to meet his burden of proving that the affirmation requirement in Mont. R. Evid. 603 violated Allen's rights to equal protection and due process. *Allen*, ¶ 14, P. App. 7.

Allen filed a petition for rehearing, which the Court denied in a one-page order. 5/12/09 Order.

IV. ALLEN'S PETITION FOR CERTIORARI

Although Allen does not ask this Court to review the Montana Supreme Court's determination that the decision to stop him was supported by particularized suspicion, more extra-record allegations have crept into Allen's petition in connection with the stop. First, Allen alleges for the first time here that the patrol vehicle's "turn signal was activated at the last second[.]" Pet. at 2. As discussed above, this contradicts Allen's assertion on direct appeal – itself never asserted in justice or district court – that Allen saw Deputy Matkin "rapidly decelerate and turn without a blinker." Appellant's Br. at 7. Second, Allen argues that he was heading in the same direction when stopped that he had been traveling when Deputy Matkin first saw him. Pet. at 2. This is misleading. As

discussed above, Allen was first observed walking in a southwesterly direction, after which Allen ducked down behind a hedgerow, ran in full flight around a building (east, south, and west), and continued running as hard as he could down an alley and across a street prior to being stopped (westbound) on another city block. Allen also argues for the first time that the trial and appellate courts should have explored ways he might have testified at trial.

SUMMARY OF REASONS TO DENY A WRIT OF CERTIORARI

1. This case is indistinguishable from *Hiibel*, which required the Montana Supreme Court to analyze two questions in determining whether Deputy Matkin's request for identification violated Allen's constitutional rights. First, *Hiibel* requires that the encounter between the officer and the suspect satisfy the Fourth Amendment, i.e., that there be a good *Terry* stop. Both the trial and the appellate court found that Deputy Matkin had particularized suspicion to justify stopping Allen. Allen does not ask this Court to review that conclusion.

The only issue remaining is whether the request for identification, in the face of a penal sanction, gave rise to a real or reasonable danger of incrimination for purposes of the Fifth Amendment. It clearly did not. Allen has maintained that he was just out for an innocent 2:15 a.m. jog, or in the alternative, that he

was walking and jogging home out of concern that his blood alcohol level would make it illegal for him to drive home; and, no evidence of criminal wrongdoing was discovered. Further, Allen's claim that he was afraid there might be a possible warrant for perhaps failing to pay a speeding ticket was unsubstantiated because a criminal history and warrants check revealed that no such warrant existed.

The only material respect in which his case differs from *Hiibel* is that Allen's own allegations demonstrate the insubstantiality of Allen's claim. Alleging a history of demands for identification in connection with prior 2 a.m. jogs, Allen provoked a stop, intending to refuse to identify himself no matter what. There is a marked difference between a legitimate fear of incrimination and a man playing games with the police. Allen's case belongs in the latter category.

2. The Montana Supreme Court properly concluded that Allen had failed to prove that he should be completely excused from any sort of affirmation requirement. Even at this juncture, Allen does not tell this Court how he might have been able to testify consistent with his purported religious beliefs. Moreover, Allen's defense was legal rather than factual. These circumstances distinguish this case from *Gordon v. Idaho*, 778 F.2d 1397 (9th Cir. 1985), which is not controlling. Thus, a writ should not be granted to review the Montana Supreme Court's determination that Allen failed to establish a violation of equal protection or due process.

3. Finally, the Montana Supreme Court's handling of Allen's vagueness challenge does not merit review. While Allen's self-incrimination claim was insubstantial, Allen had fair notice that he could not knowingly hinder or impede a concededly lawful *Terry* stop, specifically including a statutorily authorized request that he identify himself. Moreover, Mont. Code Ann. § 45-7-302, clearly applies when a person – having predetermined that he will refuse to identify himself – baits law enforcement into making an investigative stop.

I. THE MONTANA SUPREME COURT'S DECISION COMPORTS WITH *HIIBEL*.

A. The Court Correctly Concluded That Requiring Allen to Provide His Name Did Not Involve a Real or Reasonable Danger of Incrimination.

Allen does not challenge whether particularized or reasonable suspicion existed. Thus, like the defendant in *Hiibel*, 542 U.S. at 184, and unlike the situation in *Brown v. Texas*, 443 U.S. at 51-52, the effort to obtain identification occurred in the context of a lawful investigative stop. The investigation, however, did not uncover evidence that Allen was fleeing from or involved in a crime that night. Indeed, rather than maintaining silence, Allen has stated again-and-again that he was not engaged in criminal wrongdoing. Accordingly, the prospect of being required to provide his name did not implicate a real or

reasonable danger of incrimination with respect to Allen's pre-stop behavior.

Turning to Allen's claim that he was afraid of a possible arrest warrant for perhaps failing to pay a speeding ticket, the claim is both dubious and insubstantial. The claim was first raised only after Allen admitted having recently become aware of *Hiibel*. Allen's post-stop reading of *Hiibel* presumably included the caveat in *Hiibel* that "a case may arise where this is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense." 542 U.S. at 191. In any event, the claim was insubstantial because the investigation revealed that there were no warrants, criminal history, or anything explaining Allen's pre-stop behavior. Requiring Allen to provide his name under these circumstances did not involve a genuine or reasonable danger of incrimination.

Furthermore, under Montana law the failure to pay a speeding ticket is treated as a civil contempt. *See* Mont. Code Ann. § 61-8-711(3). *See also* Mont. Code Ann. § 61-8-725(2) (speeding, except in the case of school zones and other special restrictions, is not considered a misdemeanor offense and may not be charged against a person's driving record unless the speed limit is exceeded by ten miles an hour in the daytime and five miles an hour at night). Allen's assertion that he failed to pay a ticket presupposed that he was guilty or had already been convicted in person or in absentia. Thus, even if Allen had failed

to pay a prior speeding ticket, he could not have reasonably believed that his name could be used in a future criminal prosecution. *See Hiibel*, 542 U.S. at 190; *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Allen's name was not a link to an unsolved speeding violation.

Allen now argues that it was absurd for the Montana Supreme Court to suggest that Allen had to prove that a warrant or unpaid speeding ticket existed. Pet. at 7. What is actually absurd is Allen's raising the issue of a mythical warrant after reading *Hiibel* and then faulting the Montana Supreme Court for pointing out that his assertion was unsubstantiated. And the Court did not hold, as Petitioner suggests, that Allen was required to prove a danger of incrimination. The Court rather followed this Court's teachings in *Hiibel* by seeking to determine whether in this context Allen's name would be incriminating information. The only evidence brought forward to support such a conclusion was Allen's self-serving and unsupported allegation. Anyone can make an unsubstantiated claim that there might be a possible warrant for failing to pay a traffic fine. A person's "say-so," however, is insufficient in itself to establish a danger of self-incrimination. *Cf. Hoffman v. United States*, 341 U.S. 479, 486 (1951) (holding that a widely-reputed crime boss with a long criminal history faced a real danger of conviction of a federal crime in connection with a federal grand jury investigation of racketeering).

"Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." *Hiibel*, 542 U.S. at 191. "Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." *Id.* By referencing a possible warrant, Allen was suggesting that the danger of incrimination he faced was real or more significant than the danger in *Hiibel*. In truth, the danger of self-incrimination was less substantial than in *Hiibel*. Unlike Allen, Hiibel did not maintain that his pre-stop behavior was wholly innocent. Hiibel also did not make a demonstrably unsubstantiated claim regarding a warrant for supposedly failing to pay a speeding ticket. Allen's unsupported say-so was not an unusual circumstance suggesting a genuine danger of incrimination. *Hoffman*, 341 U.S. at 486.

The Montana Supreme Court correctly applied *Hiibel* when it decided that "the disclosure of Allen's name to Deputy Matkin, under the circumstances of this case, would not have been incriminating." *Allen*, ¶ 11, P. App. 6. Because the Court's decision is consistent with *Hiibel*, Allen's petition for a writ of certiorari to review that determination should be denied.

B. Citizens Who Knowingly Provoke Law-Enforcement Investigations, Intending to Refuse to Identify Themselves, Are Not a Burgeoning National Problem About Which State and Federal Courts Need Guidance.

The Petition does not identify a split of authority regarding the application of *Hiibel*. Sup. Ct. R. 10. Indeed, if this Court were inclined to address the application or scope of the *Hiibel* holding, the time to do so is not ripe. A conflict has not arisen. The small number of cases in which *Hiibel* has been distinguished have involved consensual encounters between citizens and the police or cases in which reasonable cause was absent. *See, e.g., United States v. Henderson*, 463 F.3d 27, 47 (1st Cir. 2006); *Golphin v. State*, 945 So. 2d 1174, 1198-99 (Fla. 2006).

Moreover, this case is one-of-a-kind. These facts and Allen's shifting allegations are unique, and are unlikely to be repeated in the state and federal courts. Even if the Court were concerned about a perceived lack of clarity in the principles announced in *Hiibel*, this case is *sui generis*, and for that reason provides an inappropriate vehicle on which to attempt to clarify the law.

C. Placing Allen in Handcuffs on the Ground Did Not Change the *Terry* Stop Into an Arrest. Allen Was Not Under Arrest and Asking Him to Provide His Name Was Not Reasonably Likely to Elicit an Incriminating Response in Any Event.

The Petition does not ask this Court to decide whether Deputy Matkin's detention of Allen constituted an arrest without probable cause, but Allen does make that argument in the body of the Petition. Whether properly presented or not, the claim is insubstantial.

After aggressively fleeing from a patrol vehicle after 2 a.m., Allen was handcuffed for officer safety. The officer had no idea who Allen was, why he was behaving so suspiciously, and Allen was obviously not just out for a jog. Officers can ask a moderate number of questions without a brief investigative or *Terry*-type stop becoming a custodial arrest situation requiring *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984). Here, the investigation necessarily focused on obtaining Allen's name, which "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop." *Hiibel*, at 188. It also does not change the duration or location of a stop. *Id.* Allen has conceded that the stop lasted a matter of minutes.

Only after Allen had repeatedly declined to provide his name was he removed to the patrol vehicle, patted down for weapons, taken to the jail,

and charged with obstructing a peace officer – prior to which Allen was not subjected to restraints comparable to a formal arrest. *See Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (plurality) (after Royer's luggage, driver's license, and plane ticket were seized, he was moved from a concourse to a small police room and questioned by two officers regarding narcotics trafficking); *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (teenager picked up and taken to police station for questioning). If anything, Allen complicated the investigation and transformed it into an eventual arrest by refusing to give his name, knowing that his identity would be ascertained during the booking process. *Cf. United States v. Sharpe*, 470 U.S. 675, 688 (1985) (emphasizing that the defendant's own actions prolonged the investigation).

Viewing the situation as a *Terry* stop which evolved into an arrest, the Montana Supreme Court did not specifically address Allen's assertion that he was under arrest immediately upon being handcuffed. Allen asks this Court to grant a writ of certiorari to lay down a bright-line rule that handcuffing a suspect automatically converts a *Terry* detention into a full-blown arrest. This Court, however, has declined to lay down a bright-line rule for when an investigative detention becomes an arrest, recognizing that "commonsense and ordinary human experience must govern over rigid criteria." *Sharpe*, 470 U.S. at 688. There is no "litmus-paper test" for determining when a stop has transcended Fourth Amendment reasonableness. *Royer*, 460 at 506-07. "[P]olice officers are

often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving[.]" *Graham v. Connor*, 490 U.S. 386, 397 (1989). *Cf., e.g., United States v. Cervantes-Flores*, 421 F.3d 825, 830 (9th Cir. 2005) (reasonable to handcuff for officer safety when the suspect had attempted to flee). *United States v. Dykes*, 406 F.3d 717, 720 (D.C. Cir. 2005) (no custodial arrest although officers tackled and handcuffed fleeing suspect).

Furthermore, assuming for the sake of argument that Allen was in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), Allen was not interrogated. As discussed above, asking Allen to provide his name was not reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980). And while Allen was also asked why he was running, Allen has not objected to being asked that question: in trial court, on direct appeal, and here, Allen has expanded upon the theme that he was just out for an innocent late-night jog. Instead, Allen's arguments have focused on whether he could be required to provide his name.

II. THE COURT SHOULD NOT GRANT THE WRIT TO REVIEW THE MONTANA SUPREME COURT'S DETERMINATION REGARDING ALLEN'S REFUSAL TO AFFIRM TO TELL THE TRUTH.

On the Friday before the scheduled Monday hearing on his motion to dismiss, Allen filed notice that he would not swear or affirm to testify truthfully, referring, without citation, to *Gordon v. Idaho,* 778 F.2d 1397 (9th Cir. 1985), and quoting biblical passages. The notice stated the district court should "accept this as dicta." Notice, P. App. 24-25. Allen did not raise the issue at the hearing on his motion to dismiss. The issue did not come up until trial, when Allen decided that he would not testify.

The Montana Court's treatment of the issue did not conflict with *Gordon*, as Allen suggests, because that case is easily distinguished. Unlike the plaintiff in *Gordon*, Allen sought to completely avoid any sort of affirmation requirement. Allen did not argue, as he does for the first time here, (Pet. at 14), that the district court should have investigated ways for him to testify consistent with his purported religious beliefs. Further, the plaintiff in *Gordon* represented that he could affirm in the following manner: "I understand that I must tell the truth. I agree to testify under penalty of perjury. I understand that if I testify falsely I may be subject to criminal prosecution." *Gordon*, 778 F.2d at 1401. In contrast, on appeal Allen argued that he would not affirm to tell the truth and that he would not do "anything more."

Appellant's Br. at 23-34, R. App. 14-15. Under these circumstances, the Montana Supreme Court properly concluded that Allen had "provided no legal authority or argument to support his contention that he should be *completely excused* from the oath or affirmation requirement in M.R. Evid. 603 prior to giving testimony in court." *Allen*, ¶ 14 (emphasis added), P. App. 7.

The Court cited *Gordon*, which discussed the identical federal requirement of an oath or affirmation "calculated to awaken the witness' conscience and impress the witness' mind with the duty" to testify truthfully. *Allen*, ¶ 14, P. App. 7. The Court appreciated that *Gordon* does not hold that a witness may avoid affirming altogether. Even at this late stage, Allen fails to apprise this Court how Allen's conscience could have been awakened and his mind impressed with the duty to testify truthfully without violating his alleged religious beliefs.

Finally, after Allen declined to testify, the trial judge asked Allen if there were any "factual things" Allen believed were lacking in the State's case. Allen replied, "I didn't think we completely handled the legal questions." 3/27/09 Tr. at 43:1-10. Allen has conceded that Deputy Matkin had to investigate him and that he impeded or hindered the investigation by refusing to give his name. Allen's legal defense, however, was that his Fifth Amendment right to remain anonymous was superior to the officer's authority. Under these circumstances, Allen's testifying regarding his superseding legal defense would not have

changed the outcome because Allen did not have a legal right to withhold his name in connection with a lawful investigation he invited.

Thus, the Court should not grant a writ of certiorari to review the Montana Supreme Court's determination that Allen had failed to prove a violation of equal protection or due process.

III. ALLEN FAILED TO CARRY HIS BURDEN OF PROVING THAT MONTANA'S OBSTRUCTING A PEACE OFFICER STATUTE IS UNCONSTITUTIONALLY VAGUE.

Allen makes a facial vagueness challenge to Mont. Code Ann. § 45-7-302. Pet. at 11-12. To prevail, Allen must show that the statute is "impermissibly vague in all of its applications[,]"and that "'no standard of conduct is specified at all.'" *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 n.7 (1982) (citation omitted).

Allen's vagueness challenge fails because he acknowledged that his conduct might obstruct Deputy Matkin's investigation, stating "I don't argue that not giving my name might have obstructed Deputy Matkin, but again, here the issue at hand is whether my constitutional rights to remain silent are superior to that." 3/27/08 Tr. at 29:10-15. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 495. And even if the effect of the law on

the hypothetical person of ordinary intelligence were pertinent, Montana's Obstruction law punishes an obstruction in the form of a refusal to identify only when the act is committed "knowingly." "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499.

Allen relies on *Brown* and *Kolender,* both of which are distinguishable. *Brown*, as this Court noted in *Hiibel*, involved a request for identification in the absence of particularized suspicion. *Hiibel*, 542 U.S. at 184; *Brown*, 443 U.S. at 51-52. While the law enforcement contact in *Brown* was unlawful, Allen has not asked this Court to review the Montana Supreme Court's determination that Allen was lawfully stopped. Furthermore, this Court did not address whether the Texas statute in *Brown* was unconstitutionally vague.

Kolender involved a California vagrancy statute which gave police officers unfettered discretion to determine whether persons provided "reliable and credible" identification whenever an officer determined a person was moving from one place to another for no discernable reason. The statute criminalized as disorderly conduct an individual's right to freely move about. *Kolender*, 461 U.S. at 360. *See also Papachristou v. City of Jacksonville*, 405 U.S. 156 n.1 (1972) (striking down an antiquated vagrancy ordinance which criminalized rogues, vagabonds, common night walkers, wanderers, strollers, habitual loafers, and vagrants). Montana's Investigatory Stop and

Obstruction statutes suffer from no such infirmity. The Stop statute requires particularized suspicion before the detention can occur. The Obstruction statute confines enforcement only to cases in which an officer is lawfully engaged in an investigation and the suspect fails to identify knowing that the action will likely impede the investigation.

Allen argues that the investigative stop statute at issue in *Hiibel* uses the word "demand," while Montana's investigative stop statute employs the word "request." These language differences are inconsequential because the request for identification is clearly a lawful request, Mont. Code Ann. § 46-5-401, and citizens may not knowingly impede or hinder the obtaining of such neutral information for purposes of Mont. Code Ann. § 45-7-302. The states are not required to follow a specific formula in order to require identification. As a matter of state law, the Montana Supreme Court has determined that citizens are subject to criminal sanction for knowingly hindering or obstructing lawful identification efforts. Montana's investigative stop and obstructing statutes do not need to mirror Nevada law. In Montana, as in Nevada, "[t]he threat of criminal sanction helps ensure that the request does not become a legal nullity." *Cf. Hiibel*, 542 U.S. at 188.

In the context of an investigative stop there are a number of things an officer may lawfully require a person to do, including providing identification, staying in a particular location or vehicle, moving to another location or exiting a vehicle, or putting his

hands behind his back. Under Montana law a suspect's noncompliance may provide the basis for an arrest or conviction for obstructing a peace officer if the suspect knowingly impairs, impedes, or hinders an investigation. Montana law puts citizens on notice that "the enforcement of the criminal law" and "preservation of the peace" for purposes of § 45-7-302, include efforts to identify persons lawfully stopped pursuant to § 46-5-401. R. App. 1-2.

Allen's facial vagueness challenge is insubstantial. It does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, Allen's petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 2009

APPENDIX

46-5-401. Investigative stop and frisk. (1) In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense. If the stop is for a violation under Title 61, unless emergency circumstances exist or the officer has reasonable cause to fear for the officer's own safety or for the public's safety, the officer shall as promptly as possible inform the person of the reason for the stop.

(2) A peace officer who has lawfully stopped a person or vehicle under this section may:

(a) request the person's name and present address and an explanation of the person's actions and, if the person is the driver of a vehicle, demand the person's driver's license and the vehicle's registration and proof of insurance; and

(b) frisk the person and take other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to the officer or another person present. The officer may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe that the object is a deadly weapon until the completion of the stop, at which time the officer shall either

immediately return the object, if legally possessed, or arrest the person.

(3) A peace officer acting under subsection (2) while the peace officer is not in uniform shall inform the person as promptly as possible under the circumstances and in any case before questioning the person that the officer is a peace officer.

45-7-302. Obstructing peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant, including a person serving process, shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

App. 4

#07-4390 07HL-144-AR

COURT COPY | NOTICE TO APPEAR AND COMPLAINT | ISSUED BY HILL COUNTY SHERIFF'S DEPT. | C12A | 13779

☒ STATE OF MONTANA)
☐ CITY OF _____) vs.
☒ HILL CO.)

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☒ JUSTICE ☐ CITY ☐ YOUTH ☐

COURT OF T STOPPA DEPT NO. 455

COUNTY OF HILL

LOCATED AT COURTHOUSE 2ND FLOOR

HAVRE MONTANA

ON OR BEFORE 10:00 [AM] PM

THE 26 DAY OF MAR 2007

TO ANSWER THIS CHARGE

ON THIS ____ DAY OF _____
THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

BOND $285.00

DEFENDANT NAME

FIRST	MIDDLE	LAST
JOSH	ABEL	ALLEN

STREET: [Home Address Omitted]

VEHICLE LICENSE NO.

CITY	STATE	ZIP	LIC. STATE	MO.	YR.
MARTIN CITY	MT	59926			

SEX	WT.	HT.	EYES	HAIR	DATE OF BIRTH	MO.	DAY	YEAR
M	170	508	BLUE	BRO		[Date Of Birth Omitted]		

VEHICLE MAKE

DVL NO.	DVL STATE	DVL EXP. YEAR	VEHICLE YR.	VEHICLE COLOR
07027197841 26	MT	2007		

HOME PHONE	EMPLOYER	BUSINESS PHONE

VEHICLE TYPE
☐ CAR ☐ TRUCK
☐ PICKUP ☐ TRU-TRLR
☐ MOTORCYCLE ☐ CV
☐ _____ ☐ CVE

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING
☒ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☐ _____ SECTION NO. 45-7-302

ON THE 22 DAY OF MARCH 2007 AT 2215 MILITARY TIME

UNIFORM VIOLATION CODE

DOCKET NUMBER TK07-5003

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
OBSTRUCTING A PEACE OFFICER: FLEEING FROM DEPUTY ON FOOT & FAILING TO IDENTIFY HIMSELF UPON APPREHENSION

NAMELY AT LOCATION 400 blk of 1st St W

LOCATION CODE H A V R E

IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED

☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE

☐ BA TEST GIVEN
☐ ACCIDENT
RADAR
UNIT NO. _____

EMP. ID NO. 12-7 s/ [Illegible]
DETACH NO. 12-1 SIGNATURE OF OFFICER

RECEIVED
$ JAILED
AS APPEARANCE BOND

Josh A. Allen
P.O. box 1621
Havre, MT 59501
(406) 265-2614

IN THE JUSTICE COURT OF HILL COUNTY,
CITY OF HAVRE, STATE OF MONTANA,
BEFORE TERRY L. STOPPA,
JUSTICE OF THE PEACE

THE STATE OF MONTANA PLAINTIFF, VS Josh A. Alien DEFENDANT	CAUSE NO TK07-503 MOTION TO DISMISS; FOR STATE'S FAILURE TO PROVE PRIMA FACIA [sic] CASE, with brief in support

COMES NOW the Defendant, Josh A. Allen, to enter a MOTION TO DISMISS to the charge of Obstructing a Peace Officer or Other Public Servant MCA 45-7-302 FOR STATE'S FAILURE TO PROVE IT'S PRIMA FACIA [sic] CASE, with brief in support, to wit:

Defendant filed an ANSWER AND DEMURR TO COMPLAINT (converted by the Justice Court into a motion to suppress), bringing up many relevant legal issues. The STATE failed to respond on a point by point basis to these issues. In law, failure to respond timely means that the opposing side must agree. The STATE failed to prove that the Defendant's actions of "Fleeing" and refusing to identify himself constitute a

crime, according to the factual events in the police report, and for legal reasons supported by the U.S. Constitution, MCA and U.S. Supreme Court Decisions of similar cases.

The charges of Obstructing a Peace Officer or Other Public Servant, MCA 45-7-302, should be dismissed for the following legal reasons, the Defendant's alleged act of "Fleeing" and the act of refusing to identify himself do not constitute a crime in this case and are protected by the U.S. constitution and similar cases decided by the U.S. Supreme Court. The U.S. Constitution and previous case law from the U.S. Supreme Court supersede any conflicting law in the Montana Code Annotated.

The Defendant was relying in good faith on his understanding of the U.S. Constitution and U.S. Supreme Court eases pertaining to similar matters, thus one element required of a crime, that of intent was not present in this case.

The first issue is the STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS, (motion to suppress originally titled ANSWER AND DEMURR TO COMPLAINT).

The State failed to show that the first alleged act in the charge of Obstructing a Police Officer or Other Public Servant, "Fleeing" was a crime. The State also failed to show in the Motion for Discovery the specific law that makes avoiding or going in another direction from a police officer a crime. Please see police report in attached brief, because officer admits that when he

turned his siren on, making Defendant aware that he was pursuing him, defendant stopped immediately, so the Legal question arises: Is it a crime to walk or run in another direction from a police officer, when no crime has been committed, when he is not pursuing you at that point in time? The State failed to show what law makes this a crime.

The next act is Defendant refusing to identify himself. The State replies with MCA 46-5-401. INVESTIGATIVE STOP AND FRISK as the law that required the Defendant to identify himself: please see a copy of MCA 46-5-104 in attached brief.

The Defendant states that MCA 46-5-104 does not apply in this case for legal reasons involving Constitutional Rights, U.S. Supreme Court decisions, the Montana Code Annotated and the actions of Officer Matkin.

When the police car pulled up behind the Defendant, Officer Cory Matkin got out of the car and ordered the Defendant to the ground. The Defendant complied and was immediately placed in handcuffs, before being asked his name, even thought no crime was observed by Officer Matkin. Please see the Police Report in attached brief.

The above actions of Officer Matkin, especially being placed in handcuffs, constitutes an arrest under MCA 46-4-104, even though an arrest wasn't verbally declared. Please see MCA 46-4-104 in the attached brief. The Defendant thought he was under arrest at this point in time, and acted accordingly. A normal

person on the street would also conclude that being placed in handcuffs constitutes an arrest. Please note in State's Response to Defendant's "motion to suppress, that these facts, and issues of law are left out.

Since defendant was arrested immediately, before being asked his name, this triggered the Defendant's MIRANDA RIGHT to remain silent under MIRANDA v. ARIZONA.

Defendant also was concerned that he could have had an arrest warrant for an unpaid speeding ticket, and that giving his name in this instance would be incriminating by allowing police to see the warrant, thus he was exercising his right to silence under the Fifth Amendment, and MIRANDA v. ARIZONA.

Please note that under the U.S. Supreme Court decisions "Where fundamental rights under the constitution are involved, there can be no rulemaking or legislation which can abrogate them." MIRANDA v. ARIZONA 384 U.S. 436. And "The claim and exercise of a constitutional right cannot be converted into a crime." MILLER v. U.S. 230 F at 489.

Thus due to the arrest of the Defendant and the rights secured under the U.S. Constitution, and U.S. Supreme Court case law, MCA 46-5-401. Investigative stop and frisk does not apply in this case. This is the foremost reason that the charges should be dismissed. The Defendant raised this line of argument and the State failed to respond, thus they must agree.

Next there are U.S. Supreme Court cases that override the identification requirement of MCA 46-5-401. Investigative stop and frisk, and make the identification portion of the statute inapplicable in these circumstances, notwithstanding Defendant's arrest. Please see the U.S. Supreme Court Decision in attached brief titled U.S. Supreme Court, BROWN v. TEXAS, 443 U.S. 47 (1979). In this case the defendant, Brown was cited for failing to identify himself, even though no crime was witnessed by the police, and his conviction was overturned. The U.S. Supreme court decision in William Kolender v. Edward Lawson, (461. U.S. 352 1983) also validates my argument with a very similar case to that of BROWN v. TEXAS, please see the ease in attached legal brief. In this instance, Officer Matkin admits that no evidence of crime was found (defendant is thankful the police were honorable and didn't create any to frame him.).

The Defendant recently became aware of HIIBEL v. NEVADA, in which the U.S. Supreme Court ruled that the person in question had to supply I.D. when demanded by the police officer, however the circumstances in this case are different from those in BROWN v. TEXAS, and KOLENDER v. LAWSON. The police weren't investigating a crime in BROWN v. TEXAS, and KOLENDER v. LAWSON, but they were investigating a crime in HIIBEL v. NEVADA. In this instance, the Terry stop yielded no factual evidence of a crime, so Officer Matkin resorted in frustration to arresting Defendant for refusing to identify himself.

So the legal issue arises, is it a crime to refuse to identify yourself in the investigation of a non crime? HIIBEL also raises the question of the right to refuse to identify yourself if your name could be the link in a chain of evidence linking you to a separate crime. Please see the case of HIIBEL v. NEVADA in attached brief.

Next the Defendant raises the issue of intent, as there can be no crime in this case without the element of intent. Under MCA 45-2-103. General requirements of criminal act and mental state "(6) A person's reasonable belief that the person's conduct does not constitute an offense is a defense if:

(b) the person acts in reliance upon a statute that later is determined to be invalid;

(c) the person acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed;" It should be obvious that reliance on U.S. Supreme Court Decisions and the U.S. Constitution more that [sic] fulfill this requirement, as these override the Montana Supreme Court and U.S. appellate courts. As stated previously, the Defendant was relying on his Miranda rights and U.S. Supreme Court decisions, thus Defendant meets this criteria under MCA 45-2-103.

Now I would like to proceed to the last reason for entering a MOTION TO DISMISS to the charges of Obstructing a Peace Officer or Other Public Servant: That the charge was merely an act of frustration on

the part of deputy Matkin, who lacking any cause of action against the Defendant, resorted, in desperation to arrest on this frivolous charge. The defendant could not have obstructed, because by definition obstruction is a third party act. Deputy Matkin was not dealing with a third party, just the Defendant. The Defendant was not obstructing Deputy Matkin from any action that involved a third party, just exercising his own constitutional rights.

CONCLUSION

It should be obvious to the learned court that this person did not obstruct an officer as the defendant was, in fact, arrested and had the right to remain silent. Defendant was merely exercising his rights under the Constitution of the United States and relying upon decisions of the U.S. Supreme Court when he refused to identify himself to the arresting officer and, therefore, was acting in good faith and cannot be guilty of any crime. In the Interest of Justice, and maintaining Judicial Economy, the Defendant respectfully requests that these charges be dismissed, and we can all walk away friends from the matter.

Dated this 29 day of May 2007

Respectfully Submitted,

/s/ Josh Allen pro se

CERTIFICATE OF SERVICE

I, the Undersigned, do hereby certify that I did deliver a true and correct copy of the foregoing document, MOTION TO DISMISS, on this 29 day of MAY, 2007 either by hand or depositing a copy thereof in the United States Mail, postage prepaid, in and envelope addressed to:

✓ HILL COUNTY JUSTICE COURT,

HAVRE, MT

✓ STEPHEN GANNON, HILL COUNTY

PROSECUTOR, HAVRE, MT

/s/ Josh Allen
Signature

CASE NO: DA 08-0249

IN THE SUPREME COURT OF THE
STATE OF MONTANA

STATE OF MONTANA, Plaintiff, Vs. JOSH A. ALLEN, Defendant.	)	District Court Case No: DC-07-110

APPELLATE BRIEF OF APPELLANT JOSH A. ALLEN
On Appeal from the District Court of the
Twelfth Judicial District of the State of Montana,
Hill County, The Honorable David G.Rice presiding.

APPEARANCES BY:

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* * *

M.C.A.46-5-401 as they are being combined against him. The Defendant would ask this Court to look at all of U.S. Supreme Court case law mentioned thus far and apply it to protect Defendant's rights and reach the conclusion that no crime was committed.

4. Next the Defendant would like to bring up the massive denial of equal protection and due process that the District Court imposed upon Defendant, and the religious discrimination that went along with it. Defendant doesn't believe that the District Court did this with malice or intent, but that it was done nonetheless (Trial record page 38-41). Defendant, in accordance with his truly and sincerely held religious beliefs, doesn't swear, take oaths, or affirm. Defendant put in a NOTICE OF REFUSAL TO SWEAR OR TAKE AN OATH (document 52.0) on 2/29/07 almost one month in advance of the trial. Defendant cites two biblical verses in support of his beliefs: James, 5:12 "But above all, my brethren, do not swear, either by heaven or earth, or with any other oath, but let your yes be yes and your no be no, that you may not fall under condemnation." Matthew 5:33-5:37 "Again you have heard that is [sic] was said of the men of old, 'you shall not swear falsely, but shall perform to the Lord what you have sworn.' But I say to you, do not swear at all, either by heaven, for it is the throne of God, or by earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for you cannot make one hair white or black. Let what you say be simply 'Yes' or 'No'; anything more than this comes from evil." Defendant believes that this means what it says and that to affirm falls into the category of "anything more". Defendant also believes that to affirm is synonymous with taking an oath or swearing. The 9th Federal Circuit court of Appeals agrees with this in the case of *Gordon v. Idaho*, 778 F2d 1397. Gordon

v. Idaho is directly on point here, because the exact same argument is made and the court agrees. During the trial, after Defendant refuses to take the oath, Osbourne tries to claim that the Defendant is wrong and that this issue has already been decided by the Supreme Court, yet Osbourne can cite no case to back up her claim. Regardless, Defendant would like to pose the question; who is a prosecutor for the State to tell him what his religious beliefs are under the 1st amendment? Does a State Prosecutor have the Authority to decide people's religious beliefs? Defendant thinks not. At the time of the trial the defendant didn't know if this denial of due process would have substantial impact on the outcome, since Defendant's defense is primarily legal and not factual. However after consulting with legal counsel Defendant submits that the "devil is in the details". Those details, had the defendant been allowed to testify on his own behalf could have substantially shifted the legal merits of the ease with the contested issues of fact. Defendant would ask the Court to reverse the District Court's verdict just on the basis that he was denied equal protection and due

* * *

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(3)

Supreme Court, U.S.
FILED
DEC 15 2009
OFFICE OF THE CLERK

No. 09-239

In The

Supreme Court of the United States

Josh A. Allen,

Petitioner,

v.

State of Montana,

Respondent.

On Petition For Writ of Certiorari
To The Montana State Supreme Court

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In their opposition to the petition for writ of certiorari, Respondent attempts to "reframe the debate", by answering off point and out of context the issues that petitioner raises. This is further compounded by the fact that petitioner wasn't allowed to testify in his own defense. To begin with, the Petitioner would like to state that he doesn't agree with or concede to anything in the Respondent's brief of opposition unless expressly stated here or in petitioner's request for a Writ of Certiorari. Petitioner expressly disagrees with the Respondent's restating the issues on page (i) of his Brief in opposition. Petitioner disagrees that Respondent's STATEMENT OF THE CASE is factually correct, and maintains that his STATEMENT OF THE CASE is the true and accurate one. Petitioner, not being allowed to testify, couldn't make the record to explain how Deputy Matkin's testimony changed from the Justice Court to the District Court, in order to comport his actions and testimony to existing case law and legal definitions, all at the coaching of the local prosecuting attorney. Respondent makes unsubstantiated suppositions about Petitioner's behavior and legal arguments, while making light of the fact that Petitioner wasn't allowed to testify.

Petitioner would suggest that the State of Montana, via its prosecuting attorneys and Courts, has gone to such lengths to avoid admitting that they falsely arrested and imprisoned Petitioner.

I. DISAGREEMENT(S) WITH RESPONDENT'S STATEMENT OF THE CASE

On page 1 of Respondents Brief (RB) Deputy Matkin claims Petitioner ducked behind a hedge, and began to run around the building. Petitioner did not duck behind any hedge row. Petitioner did not run as hard as he could. On (p4 RB) Matkin claims Petitioner attempted to "hook" his legs. This is a flat out lie; Petitioner moved his foot about two inches in order to move his right hip in anticipation of Matkin removing his wallet from his pocket. When he did this, officer Mike Labaty grabbed a big handful of petitioners hair, rudely yanked his head back, and yelled in his ear, "that's a felony boy assaulting an officer, now you're going to Deerlodge" (Montana State prison location). Fearing further assault upon him, petitioner quickly explained that he didn't want the contents of his wallet spilled. As Petitioner sat in the holding cell at the Detention center, he listened to Matkin tell the booking officer how he would "like to charge him with felony assault, but didn't think he could make it stick". Petitioner has stated this in his pleadings to the lower courts already.

When petitioner stated that there where no "factual issues to be decided at trial" and only legal issues, he meant insofar as the issue of whether he did or did not give his name. On (p7 RB) respondent raises petitioner's reliance on previous Supreme Court cases and his recent awareness of *Hiibel*. Petitioner mentioned this in his earlier defenses as Montana law states that relying on U.S. Supreme Court cases is a defense. Here respondent is insinuating that Petitioner is raising his fear of an

arrest warrant after reading *Hiibel*, in order to create another defense based on *Hiibel*, this is unsubstantiated and simply not true. Petitioner, being a mere pro se litigant did not realize that his fear was a valid defense. The Petitioner's statement about reading *Hiibel* after reading Brown v. Texas, Terry v. Ohio, and Miranda was made in the context of Relying on these cases as a defense to negate the "knowingly portion of Mont code 45-7-302 (Appellate Br. Montana Supreme Court page 29).

II. REASONS THE PETITION SHOULD BE GRANTED

1. PETITIONER WAS DENIED EQUAL PROTECTION AND DUE PROCESS WHEN HE WASN'T ALLOWED TO TESTIFY IN HIS OWN DEFENSE.

Respondent essentially claims that *Gordon v. Idaho*, 778 F.2d 1397 (1985) is off point and out of context. The Montana Court's treatment of the issue, contrary to Respondent's claim, heavily conflicts with *Gordon*. *Gordon* is directly on point in this case. Respondent claims that Gordon did not seek to avoid any sort of affirmation requirement because "he represented he would affirm in the following manner","I understand that I must tell the truth, I agree to testify under penalty of perjury." (p24RB). Since when does a prosecuting attorney have the authority to determine what "representing to affirm" means? If you read *Gordon*, you will see that he expressly refused to swear an oath or affirm in any way because the two terms are synonymous, and the cited biblical verses prohibit anything more

than a yes or no answer. Petitioner's Writ App. 24-25. To decide that the Montana or Federal rules of evidence requirements can override a Citizen's religious beliefs is both an infringement on religious free exercise and equal protection and due process. Respondent's claim that the issue was not raised until trial is patently false, as mentioned in Petitioner's Writ (App. 24-25), the "Notice of Refusal to Swear or Affirm to Take an Oath" was filed almost one full month ahead of trial, the District Judge had a duty to at least read it, and then determine a way for Petitioner to testify. Even being filed on the "eve" of the preliminary hearing the judge could have read a simple two page notice. Respondent claims that "even at this late stage, Allen fails to apprise this court how Allen's conscience could have been awakened and his mind impressed with the duty to testify truthfully without violating is alleged religious beliefs" (p25 RB). Petitioner plainly agreed to tell the truth in his notice. What more could someone do who believes anything more than a yes or no answer is prohibited by the bible? In this case, just like *Gordon*, the Judge had a duty to investigate and probe for a way for Petitioner to testify. Contrary to what Respondent would claim, this argument was raised the moment *Gordon v. Idaho* was raised. Even if *Gordon* was never raised, Petitioner still had the Constitutional right to testify in accordance with his religious beliefs. Petitioner would have testified, but the judge would not let him. Being allowed to testify could have easily shifted the combination of legal issues and contested issues of fact in the Petitioner's favor. Petitioner could have testified, amongst other things, to his fear of having an outstanding speeding ticket, and the fact that he

did not know whether or not he had any warrants out for his arrest. Petitioner prays this Court will give him relief from the lower courts running roughshod over his rights, and in the process set precedent to protect others from the same treatment.

2. THIS CASE IS DIFFERENT FROM HIIBEL.

The Respondent's brief, though carefully crafted is full of subtle contradictions and unsubstantiated claims. In some places, Respondent claims that Petitioner was trying to "evade" police, while elsewhere he claims that Petitioner "knowingly provoked" law enforcement. Does it make credible sense that if Petitioner is trying to avoid a confrontation with police, that he is also trying to "bait" them? Does it make sense that Petitioner was looking forward to a four day stay in jail, and all of this expense and effort to defend himself? Had Petitioner been allowed to testify, he could have explained that he was trying to avoid a late night confrontation, because of bad past experience. Respondent's claim that Petitioner knowingly provoked this is unsubstantiated.

The material circumstances that initiated this case are what begin to set it apart from *Hiibel v. Nevada* 542 U.S. (2004). In *Brown v. Texas, Terry v. Ohio, Kolender v. Lawson*, and Petitioner's case the policeman just "happened upon" the suspect and acted in his own unfettered discretion. In *Hiibel* the police were called out to the scene to investigate. Nor did *Hiibel* involve the tense circumstances of the suspect being ordered to the ground and put in handcuffs, and then placed under questioning.

Next, despite what Respondent would like this Court to believe, Montana law is different than

Nevada law, (Petitioners Writ p4-10). The language of Mont. Code Ann 46-5-401 uses two different words, request and demand, which are not synonymous. Montana law mentions the suspect's actions, address, and name under the word request. *Hiibel* mentions demand of a name and nothing else. Respondent claims the "language differences are inconsequential because the request for identification is clearly a lawful request", (p28 RB). A policeman can lawfully request that a murder suspect confess, however even if that suspect is guilty it is not a crime for the suspect not to confess. Under Respondents line of reasoning it would be a crime for the suspect to not confess, because apparently Respondent believes request and demand are legally synonymous. The simple fact of the matter is Montana law doesn't require a Citizen to identify themselves to a policeman.

Next, *Hiibel* never made the claim that he was concerned that his name could be the beginning link in a chain of evidence. Respondent insinuates that Petitioner read *Hiibel*, and then came up with this defense. This is not true, had Petitioner been allowed to testify, he could have substantiated this. Even without this claim, Petitioner would like to know how he could have known, at the scene that he did not have any warrants out for his arrest, or that there was no possible way for his name to be used against him. Respondent claims (p23 RB) that the police officers are "often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving" (In regards to placing Petitioner in handcuffs for officer safety). If a policeman can make split-second decisions to protect himself, then under equal protection and due

process shouldn't a Citizen be able to make similar decisions to protect his rights? If the answer is no, then how is the average man on the street who faces a similar situation able to protect his rights? While he is under pressure, being questioned at the scene by a policeman, is he to think to himself, gee does this situation fall under Terry, Brown, Kolender, or Hiibel, what are my Miranda rights here? To put such a burden on the average citizen is to defeat the simple intent of the Fifth Amendment. At the scene, Petitioner was under this same duress and not knowing for sure that his name could not be used against him he chose to shut up.

> "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and farsighted." *Marchetti v. U.S.* 390 U.S. 39 (1967)
>
> "You can and must keep your mouth shut for protection under the 5th amendment." *Belnap v. U.S.* et al, Dist Court (Utah), No C. 149-71.
>
> "There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves" *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

Respondent cleverly fails to emphasize the admission by deputy Matkin (p2, p15 RB) that one of the purposes of wanting Petitioner's name was to search for warrants. The hypocrisy of the

Respondent's argument is that it is ok for the policeman to demand a suspect's name for the purposes of looking for warrants, thus admitting the value of the name for investigatory purposes, but it is not ok for the suspect to withhold his name to protect himself from the same investigation. The respondent thus concedes that petitioner's name could be the beginning link in a chain of evidence to be used against him. The respondent then claims that since no warrants were found that there was no reasonable possibility that the petitioner's name could be used against him. This implies that the petitioner had to prove ahead of time that he needed the Fifth Amendment, obviously contravening its intended purpose. The Supreme Court declared that:

> "The privilege afforded not only extends to answers that would in themselves support conviction under a federal criminal statute but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal crime.....*The claimant is not required to prove the precise danger since by so doing he would be forced to disclose those very facts from which the privilege protects. Hoffman v U.S. (CF 341 U.S. 479,486,71 CT. 814,818,95 L Ed 1118.*
>
> "The (5th amendment privilege is not limited to testimony, as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate." Boyd vs. U.S. Supra; Brown vs Walker, 161, U.S. 591.

According to the logic put forth by the respondent, and lower courts, one only has Fifth Amendment protection if there is absolute proof beyond a shadow of a doubt, that there is something incriminating with which to need its protection. Which in turn would imply that the person bring forth the incriminating evidence to gain the protection of the Fifth Amendment. If this is the case then an obstruction statue can be used to prosecute a murder suspect for not confessing, and the original intent of the Fifth Amendment is null and void.

3. THIS CASE PRESENTS AN OPPORTUNITY TO BETTER UNDERSTAND MIRANDA RIGHTS

Respondent also claims that Petitioner complicated the stop and turned it into an eventual arrest by refusing to give his name, knowing that his identity would be ascertained during the booking process (p22 RB). Here again Respondent is assuming facts not in evidence, assuming that Petitioner knew he would be arrested. Petitioner assumed his refusal to give his name was legal under his Miranda right to remain silent. Respondent also states over and over that this was a lawful request, and that the refusal to answer is an obstruction. Petitioner has agreed over and over that the policeman can ask him questions, however Petitioner has always maintained he has no corresponding duty to answer them, just as someone guilty of a crime has no duty to confess, even though this obstructs the police that are investigating that person.

> "The Officer may ask the terry detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond" *Berkemer v. McCarty,* 468 U.S. 420, 439 (1984).
>
> "Of course, the person stopped is not obliged to answer, answers may not be compelled and refusal furnishes no basis for arrest, although it may alert the officer to the need for continued observation." *Terry v. Ohio,* 394 U.S. at 34

Petitioner does not concede that this was just a Terry Stop, as being placed facedown in the dirt, handcuffed, and not being free to leave easily meets the definition of an arrest. Petitioner, though not interrogated in an interrogation cell was still asked questions for the purpose of gaining information to be used against him. This court left the issues in this case unanswered in *Hiibel*, this case presents an opportunity to answer them.

CONCLUSION

This petition presents an opportunity in which to better understand Miranda rights, Terry stops and further define the First Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. This case is not *sui generis* as Respondent claims, as similar situations occur everyday around this nation. The opinion below is clearly erroneous as a matter of law, fails to comport with reason, logic and common sense, conflicts with the 9th Federal Circuit, intent of

Montana lawmakers, and most importantly previous case law of this Court. So as to protect the Constitution and laws of the United States, and prevent a slide down the slippery slope to a police state, Petitioner prays that this Court issue a writ of certiorari and vacate the judgment of the Montana State Supreme Court.

Respectfully submitted,

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